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A CHAPTER IN LEGAL BIBLIOGRAPHY.

THE OLD ABRIDGMENTS.

STATHAM'S Abridgment of the Law, folio.

In French, without title, date, or pagination. This work, the first of the Abridgments of the Law, and the first English law book ever printed, is a kind of digest, containing most of the titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases from the reign of Edward I. to the end of the reign of Henry VI., concisely abridged from the Year Books, together with many original cases not extant in the Year Books of those reigns. It has served as a model for others in later times, but was superseded by the Abridgment of Fitzherbert, which was published about the same period. There is only one edition, which is in folio, without date, and is supposed to have been printed by W. Tailleur, at Rouen, for Pynson; at the end of the Table are the words: "Per me, R. Pynson," and at the end of the volume is Tailleur's device. This Abridgment consists of 380 pages, and is a chef-d'œuvre of splendid typography, the singular beauty of which has rarely been exceeded in modern times. "The paper is of a very firm, silky texture," says Judge Story, "forming a strong contrast to the sleazy linen and cotton of our day; the ink is of a bright jetty and unfaded black; the type, though small, and partly composed of abbreviated characters, has a sharp and distinct face; and the mechanical execution is so exact, that scarcely a letter exhibits a blur, and the surface of every page presents a uniform appearance, putting to shame many of the standard volumes of our times."

In Fuller's Worthies, published in 1662,[1] is the following account of our author sub nom., John Stathom:—

"He was born in this county [Derbyshire,] in the reign of King Henry the Sixth; and was a learned man in the laws, whereof he

[1] We print from the edition of 1811.

wrote an 'Abridgment,' much esteemed at this day for the antiquity thereof: for otherwise lawyers behold him (as soldiers do bows and arrows, since the invention of guns) rather for sight than service. Yea, a grandee in that profession hath informed me that little of Stathom (if any at all) is law at this day; so much is the practice thereof altered; whereof the learned in that faculty will give a satisfactory account; though otherwise it may seem strange, that, reason continuing always, the same law grounded thereon should be capable of so great alteration. The first and last time I opened this author I lighted on this passage: Molendinarius de Matlock tollavit bis, eò quod ipse audivit Rectorem de eâdem villâ dicere in Dominicâ Ram. Palm. Tolle, tolle.[1] 'The miller of Matlock took toll twice, because he heard the rector of the parish read on Palm Sunday, Tolle, tolle, i. e. Crucify him, crucify him.'[2] But if this be the fruit of Latin Service, to encourage men in felony, let ours be read in plain English."

FITZHERBERT'S Grand Abridgment of the Law.

This is one of the most ancient and authentic legal records, containing a great number of original authorities, quoted by different authors, which are not extant in the Year Books, or elsewhere to be met with in print. It has also the advantage of being a very copious and useful common-place or index to the Year Books, down to the twenty-first year of the reign of Henry the Seventh.

In the Library of Lincoln's Inn there is a beautiful copy of the first edition of this work, which is a very correct edition, printed in 1516, presented by Ranulph Cholmeley, and as there seems to be some uncertainty respecting the date of the first edition, some bibliographers having stated that it was printed in 1514, we give a description of this copy by Mr. Spilsbury, the accomplished librarian of Lincoln's Inn.

"This edition is in three parts, each having a frontispiece. Prefixed to the first part is a woodcut of the king on his throne, crowned, and holding sceptre and mund, and over this cut are the words: Prima pars hujus libri. To the second part is prefixed a woodcut of the royal arms, crowned, supported by a dragon and greyhound, with a portcullis on each side of the arms: above, two angels, bearing scrolls with an inscription encircling a rose; and over this cut are the words: Sequitur secunda pars. The third part has the same frontispiece as the second, and over it the words:

Ultima pars hujus libri.

¶ The price of the whole boke (XLs.) which boke conteynyth iii grete volumes.

[1] Stathom, Tit. Toll, last case of the Title.
[2] It is the Gospel appointed for the day.

At the end is the following colophon:

> Finis tocius istius operis finit XII die Decembr,
> A.°dni Millecimo quingentesimo sextodecimo.

"Beneath the colophon is a cut of the royal arms, but of smaller size than the former, and with some variations.

"From the evidence of the woodcuts, the same having been used in the 'Fructus Temporum' printed by Wynkyn de Worde in 1515, Mr. Herbert concludes that the work was either executed by that printer, or printed for him in France. It is worthy of notice, however, that the same type is used by John Rastell in the Tables to this Abridgment printed by him in the following year, 1517, the smaller letter being used in the Prologue, and the larger chiefly in the Tables. A copy of this work was also presented to the Library by R. Cholmeley. In a notice of an edition of the Abridgment supposed to have been printed by Pynson in 1514, Mr. Herbert says there is a copy in Lincoln's Inn Library. This is erroneous; for it is the edition of 1516, as just described, which is in that Library; nor can an edition of 1514 be traced in either of the Libraries of the Inns of Court, the Bodleian Library, or the British Museum. There is a copy at Holkham of the edition of 1516.

"The copy in Lincoln's Inn is bound in three volumes in a modern binding. On the inside of the covers of the first and second parts is pasted a paper label with the inscription of the donor: Ex dono Ranulphi de Cholmeley, &c.; and on one of the fly-leaves of the second part is the following quaint inscription: 'Of your charity pray for the soul of Robert Crawley sometime donor of this book which is now worm's meat, as another day shall you be that now art full lustye, that remember, good christian brother. Farewell in the Lord. 1534.' At the end of the third part, also on one of the fly-leaves, is a Latin inscription in the same handwriting, nearly to the same effect."

The Abridgment was again printed by R. Tottell in 1565, two vols. folio: and with additional general Table by J. Rastell, in 1577, 4to.

Of this author old Fuller wrote:—

"Sir ANTHONY FITZ-HERBERT, son of Ralph Fitz-Herbert, Esquire, was born at Norbury in this county [Derbyshire]. He was first the King's Serjeant at Law; and was afterwards, in the fourteenth of King Henry the Eighth, made one of the Justices of the Common Pleas; so continuing until the thirtieth year of the said King, when he died. He wrote the excellent book 'De Naturâ Brevium,' with a great and laborious 'Abridgment of the Laws,' and a Kalendar and Index thereunto; monuments which will longer continue his memory, than the flat blew marble stone in Norbury Church under which he lieth interred."

"Mr. Fitzherbert," wrote Fulbecke in 1599, "must needs be commended for great pains, and for well contriving that which was confusedly mingled together in many Year Books; but he was more beholden to nature than to art, and whilst he labored to be judicial, he had no precise care of methodical points; but as he was in conceit slow, so he was in conclusion sure; and in the treatises which be of his own penning, he sheweth great judgment, sound reason, much reading, perfect experience, and in the whole conveyance of his discourses giveth sufficient proof, that he sought rather to decide than devise doubtful questions."

BROOKE'S Grand Abridgment of the Law.

In this work which is disposed under more titles than that of Fitzherbert, many readings are abridged which are not now extant, except in a work entitled Brooke's New Cases. Of this author in comparison with Fitzherbert, Fulbecke says: "Mr. Brooke is more polite, and by popular and familiar reasons hath gained singular credit, and in the facility and compendious form of abridging cases, he carrieth away the garland. But where Mr. Fitzherbert is better understood, he profiteth more, and his abridgment hath more sinews, though the other hath more veins; but I am loath to make them countermates, and therefore leave the judgment thereof to others."

Sir ROBERT BROOKE was Chief Justice of the Common Pleas in the reign of Philip and Mary. The first edition was printed in 1568, 4to; it was reprinted in 1568, and in 1570; in 1573 it was printed in two vols. royal folio, by R. Tottell, and again in 1580.

In Fuller's Worthies is the following note:—

"Reader, be charitably pleased that this note may (till better information) preserve the right of this county [Suffolk] unto Sir ROBERT BROKE, a great Lawyer, and Lord Chief Justice of the Common Pleas in the Reign of Queen Mary. He wrote an Abridgment of the whole law, a book of high account. It insinueth to me a probability of his birth herein, because (lawyers generally purchase near the place of their birth) his posterity still flourish in a worshipful equipage at Nacton, nigh Ipswich, in this county."

"The character of the Abridgments of Fitzherbert and Brooke," says Judge Story,[1] "may be summed up in a few words. They are mere indexes, under general heads, of the principal adjudged cases up to their own times, in which the points are accurately stated, but without any attention to order, or any attempt at classification. As repositories of the old law, they now maintain a very considerable value, and may be consulted with advantage. Whoever examines them (for a thorough perusal of them will be a mere waste of time) will probably feel inclined, when he can, to ascend to the original

[1] Miscellaneous Works, pp. 384, 385, ed. 1852.

sources; but if these should not be within his reach, he may rely with confidence, that these learned judges have not indulged themselves in a careless transcription, or a loose statement, of the law. In our own practice we have frequently found them the safest guides to the old law, and particularly to the contents of the Year Books. At the times when these Abridgments were originally published, they must have been very acceptable presents to the profession. But many of the titles are now obselete; and the works lie on the dusty shelves of our libraries, rarely disturbed, except upon some extraordinary inquiry, touching the feudal tenures, or the doctrine of *seizin*. The modest motto prefixed to both of them deserves to be remembered: *Ne moy reproves sauns cause, car mon entent est de bon amour.*"

ROLLE'S Abridgment of Cases and Resolutions in the Law.

According to Lord Campbell, Rolle, while a student at the Inner Temple, London, "composed that wonderful Digest which, with additions and corrections made by him in after-life, was given to the world under the title of 'Rolle's Abridgment,' and which shows not only stupendous industry, but a fine analytical head for legal divisions and distinctions." And when this work was cited at the bar in a case in the King's Bench in 1670, two years after it was published, TWISDEN J. remarked: "That was his opinion, it may be, when he was a student. You have in that work of his a common-place which you stand too much upon; but otherwise it is nothing but a collection of Year Books, and little things noted when he made his common-place book. His private opinion must not warrant or control us here."[1] There is a preface addressed to young students in the law of England, by Sir Matthew Hale, which has been reprinted in the first volume of the Collectanea Juridica. Lord Hale says: "Though it is of excellent use and worth, yet it comes far short of the worth and abilities of him, that compiled it, and therefore is an unequal monument of him."

Mr. Hargrave speaks of this work as excellent in its kind, and in point of method, succintness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of the law.[2] Judge Story says the chief advantage that it possesses over the earlier compilations is in a more scientific arrangement of the materials, and a greater subdivision of the general heads, so as to bring together matters of the same nature or relative to the same branch, instead of heaping them up in one undistinguishing mass.

Henry Rolle was Chief Justice of the Upper Bench during the Usurpation. The work was printed in 1668, in two volumes, folio, in French.

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[1] Osborne *v.* Walleeden, 1 Mod. 273.

[2] Notes on Co. Lit. 9 *a*.

The preceding works constitute the principal of the old Abridgments. We have purposely passed over, as of no account, Hughes's, which was published in 3 vols. 4to. 1660–1663; and Sheppard's, which was printed in 1675 in 3 vols. 4to; and also Nelson's, which is chiefly, and very inaccurately, copied from Hughes's, and published in 1725 in 3 vols. folio. D'Anvers's Abridgment, which extends only to title "Extinguishment," is a translation of Rolle's with the addition of more modern cases. The second edition was printed in 3 vols. folio, in 1725, 1732, 1737.

ANECDOTES OF THE JUDGES.[1]

Chronica Juridicialia; or, an Abridgment and Continuation of Dugdale's Origines Juridiciales; containing a Calendar of the Years of our Lord God and the Kings of England, &c. from William the Conqueror to the year 1739. With Chronological Tables of the names of all the Lord Chancellors, Judges, Serjeants, &c. showing the times of their several promotions, &c. opposite to the years in the said Calendar. Second ed. 8vo. 1739.

THERE is, perhaps, no class of men who live more immediately within the observation of the public eye, than the judges of our courts of justice. The importance of the functions which they are appointed to perform, the private interests which are affected by their decisions, their high station in a liberal and much regarded profession, and the rank accorded to them in society, all contribute to render their character and conduct the object of personal attention. The display and pomp too which attend all their movements, as the great administrators of public justice, allure the eyes of the crowd. The entry of a judge into an assize town, escorted by the sheriff and his attendants, and surrounded by his javelin-men, as they are termed, is, to the provincial spectators, a very awful and imposing ceremonial. A variety of little arts have been invented to keep alive this feeling of veneration. Ermine and scarlet, and full-bottomed wigs on the judgment-seat, and shovel hats and scratches off it, distinguish the administrators of our laws, whose time of life in general prevents these usages from appearing ridiculous. They are addressed by a title peculiar to the nobility;[2] and nothing is omitted which can contribute to render them honored and respected.

It would have been well, if at every period of our history the judges had contented themselves with the professional distinctions

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[1] From The Retrospective Review, vol. x. p. 60.

[2] It was only, however, during the last century that the puisne judges began to be addressed by the title of "your lordship." In the Year Books they are constantly addressed by the title of "sir," "*sir, vous voyez bien*," &c. The late Serjeant Hill was, we believe, the last who persisted in the ancient fashion.

thus freely bestowed upon them, but unfortunately this has not been the case. The eminent station assigned them necessarily brings them into occasional contact with the government and the court; and how dangerous this approximation is to the interests of the public, we learn from history. The biography of many of our judges is, on this account, by no means confined to their judicial career, but often embraces the political history of the times in which they lived. Nor are their memoirs, by any means, devoid of other interesting matter. The subjects of them are generally men who mingled much in society, and whose names are consequently connected with those of the celebrated persons of their day. Occasionally, too, we meet amongst them with men whose singular characters and eccentric habits, render their biography highly entertaining. It is with the view of collecting the scattered anecdotes relative to the most remarkable of these personages, that we enter upon the present task; and, in the following pages, we propose to give some account of the more distinguished ornaments of the bench, during a very singular period of judicial history, — the reign of Charles II.

At the commencement of the seventeenth century a very considerable change had begun to take place in the character of the judges. In the political struggles which were even then generating, it was a difficult task for men of their influence and station to remain neuter. In earlier times the Crown had never thought it worth while to bespeak the services of the judges, in assisting it to assert the prerogative; the hand of power had, in general, been sufficiently strong without such aid. "It is very observable," says Clarendon, in speaking of the opinions delivered by the judges upon the matter of ship-money, "It is very observable, that in the wisdom of former times, when the prerogative went highest (as very often it hath been swoln above any pitch we have seen it at in our times) never any court of law — very seldom any judge or lawyer of reputation was called upon to assist in any act of power, the Crown well-knowing the object of keeping those the objects of reverence and veneration with the people, and that though it might sometimes make sallies upon them by the prerogative, yet, that the law would keep the people from any invasion of it, and that the king would never suffer whilst the law and the judges were looked upon by the subject as the asylum for their liberties and security."[1] Upon the accession of James I., however, these maxims were forgotten, and a system of intimidation and corruption was then commenced by the Crown which did not terminate until the Revolution. We have on a former occasion[2] enabled the reader to form some idea of the conduct observed by James I. towards his judges, and it is almost

[1] Clar. Rebel. I 124.

[2] See Life and Character of Sir Edward Coke. Retrospective Review, vol. viii. 105.

unnecessary to advert to the infamous prostitution of the judicial character which distinguished the reign of his successor. With respect to the affair of ship-money, even Clarendon speaks of it in the warmest terms of reprobation. "And here the damage and mischief cannot be expressed, that the Crown and State sustained by the deserved reproach and infamy that attended the judges, by being made use of in this and the like acts of power." Upon the whole, however, the odious part acted by the judges in the reign of Charles I., was perhaps serviceable to the interests of freedom, by awakening the feelings of the people; and Finch's speech in the Exchequer chamber is said to have rendered ship-money much more abhorred and formidable than all the commitments of the Council Table. But without canvassing the character of the Bench at this period, or during the Commonwealth, which we may possibly attempt upon some future occasion, we shall only observe, that the system which had its origin in the reign of James I., and attained so pernicious a maturity during that of his son, was revived in all its full vigor soon after the Restoration. In the times of the Plantagenets and the Tudors it was unnecessary to veil the encroachments of power under the semblance of justice; but now, when any act of oppression or iniquity was to be wrought, it was essential to clothe it with the judicial sanction. Accordingly we find that the utmost exertions were at this time made by the Crown, and in general with the greatest success, to render the judges subservient to the royal wishes. The consequence of this was, that men of loose principles, and abandoned manners, were selected to fill the judgment seat; and the records of our courts of justice are disgraced with such names as Jefferies, Scroggs, Wright, and Saunders (though in legal attainments the latter was eminently fitted for his station). Of the personal character of Saunders, and, indeed, of some other of the judges of this time, an account has been given in our former volumes,[1] which we shall not repeat upon this occasion, only observing that it will be necessary to recur to the portrait of Saunders, as painted by Roger North, in order to complete the series of sketches which we now intend to present to the reader.

In discussing the character of our English judges, an examination into the nature of the *tenure* by which they held their offices (a subject very ably illustrated by Mr. Serjeant Heywood in the Appendix to his *Vindication of Fox's Historical Work*,) will be found to throw great light upon our judicial biography. During the reigns of Elizabeth and James I. the commissions of the Chief Justices of the King's Bench were in general without any specification of the tenure, and they were removable at the pleasure of the king. The puisne Judges, both of the King's Bench and Common Pleas,

[1] Retrospective Review, vol. ii. p. 252; vol. viii. p. 17.

held *quam diu nobis placuerit;* but the judges of the Exchequer were appointed *quam diu se bene gesserint.* James I. was advised by Bacon to exercise this power in the case of Sir Edward Coke;[1] and in the succeeding reign, Sir Randolph Crewe (who had resisted the system of illegal loans and benevolences) and Sir Robert Heath were unceremoniously displaced. In the year 1640, the House of Lords petitioned that the patents of all the judges should be made *quam diu se bene gesserint*, and not as formerly, *durante bene placito;* "unto which request his majesty was graciously pleased to condescend." Cromwell appears to have paid but little regard to this regulation, and removed a Baron of the Exchequer, and one of the judges of the Upper Bench. For some time after the Restoration, the patents of the judges pursued the form adopted by Charles I., and ran *quam diu*, &c.; but the inconvenience of not holding those offices altogether dependant upon the Crown was soon felt, and the old form of the patents, *durante bene placito*, was restored. The time when this alteration first took place is not clearly ascertained; but it was probably before *Dighton's* case, which was tried in the King's Bench, in Trinity Term, 1670; on which occasion, the offices of judicature in Westminster Hall were said by the court to be held *durante bene placito.* The patent of Sir Richard Rainsford, who was made one of the judges of the King's Bench, in the year 1678, was *durante bene placito.*[2]

The appointment of the judges at this period, as at present, was virtually in the power of the Lord Chancellor; but this right of patronage was disputed by Jefferies, when chief justice, with North, then Lord Keeper. The chief justice was supported by a strong party at court, who were adverse to the Lord Keeper, and anxiously resorted to every device in order to lessen his influence. Upon one occasion they succeeded in procuring the appointment of Sir Robert Wright to a puisne seat on the bench, against the opinion of North, and certainly to the public scandal of the government. This incident is a striking proof of the extent to which the system of corruption was carried at the court of Charles II., and of the influence which Jefferies possessed with the king. Sir Robert Wright was "a comely person, airy and flourishing, both in his habits and way of living;" but at the same time so wretched a lawyer, that he was absolutely unable to give an opinion; and when a case was laid before him, he usually applied for assistance to his friend North, who furnished him with an opinion, which Wright copied and signed. Having dissipated his estate in debauchery, and finding himself on the brink of ruin, he applied to Jefferies to rescue him from his difficulties, by getting him made a judge. Upon a vacancy occurring, the king consulted the Lord Keeper respecting a proper person

[1] See Bacon's Works, vi. 125.

[2] Siderfin, p. 408.

to fill it, adding, "My lord, what think you of Serjeant Wright? why may not he be the man?" North answered that he knew him but too well, and was satisfied that he was the most unfit person in England to be made a judge. "Then," said the king, "it must not be;" and the matter was for a time suspended. We shall relate the sequel in the words of Roger North.

"Wright still by his friend Jefferies pushed his point, and in the interim worked all he could by most importunate applications and bitter tears (but for no other reason than that if he failed now he was utterly ruined), to gain his lordship to yield that he might be a judge; but to no purpose: his lordship was inflexible: and though he wished the poor man well, upon account of old acquaintance, he would not gratify him at the cost of his own breach of duty, or rather, in that respect, perjury. The king took his time more than once to speak to my lord-keeper, saying, as before, *Why may not Wright be a Judge?* and at last, *Is it impossible, my lord?* His lordship seeing the king's pangs, for it was plain that this man, by the secret court claim, was determined to be preferred; for he was a creature of Jefferies, and a tool that would do anything; and they wanted only the formality of my lord-keeper's concurrence (to whom the king positively would have a due respect paid), took the freedom to say, that the making a judge was his majesty's pleasure, and not his choice; that he was bound to put the seal as he commanded, whatever the person was, for of that his majesty was to judge, and finally determine. He could but do his duty by informing of his majesty of what he knew to be true; and particularly of this man whom he personally knew to be a dunce, and no lawyer; not worth a groat, having spent his estate by debauched living; of no truth nor honesty, but guilty of wilful perjury to gain the borrowing a sum of money: and then he opened more at large the matter of the affidavit.—'And now,' said the lord-keeper, 'I have done my duty to your majesty, and am ready to obey your majesty's commands, in case it be your pleasure that this man shall be a judge.' 'My lord-keeper,' said the king, 'I thank you,' and went away; and soon after the warrant came and he was instated."[1]

It is not surprising that a man so peculiarly fitted to become the instrument of unconstitutional measures as Wright was, should find favor in the eyes of James II. He was accordingly in that reign appointed chief justice; but his conduct was such, as even to extort from his former patron, Jefferies, at that time chancellor, the appellation of *beast*.

Amongst the many profligate men whose baseness was the means of elevating them to the bench, during this reign, Sir William

[1] Vol. ii. p. 174.

Scroggs may, perhaps, be selected as an honest specimen of the class to which he belonged. His birth was mean, being the son of a butcher; but by his own exertions he acquired considerable practice at the bar, and was made a serjeant. His professions of loyalty found favor at court, and he was accordingly appointed chief justice of the King's Bench at the time when North presided over the Common Pleas. Upon the first opening of the Popish Plot, he appears to have been deceived into an idea that, by favoring the discoverers of it, he was rendering an acceptable service to the king, and he accordingly interested himself, in a violent and scandalous manner, to procure convictions of persons accused of being participators in the plot; but having received some intimation that the course which he was pursuing was not so agreeable to the king as he had imagined, "he turned as fierce against Oates and his plot, as before he had ranted for it; and thereby gave so great offence to their evidenceships, the plot witnesses, that Oates and Bedloe accused him to the king, and preferred formal articles of divers extravagancies and immoralities against him." Some of the charges brought forward upon this occasion are amusing enough, and when the character of Scroggs is considered, appear by no means improbable. The sixth article runs as follows:—[1]

"That the lord chief justice is very much addicted to swearing and cursing[2] in his common discourse, and to drink to excess, to the great disparagement of the dignity and gravity of his said place. He did in his common discourse at dinner, at a gentleman's house of quality, publicly and openly use and utter many oaths and curses, and there drank to excess."

The accusations thus preferred were heard before the king in council, when Scroggs attacked his adversaries with much severity and wit; but, on the failure of sufficient proof, the proceeding was abandoned. Such, however, had been the outrageous conduct of the chief justice upon many occasions, in the King's Bench, that articles of impeachment were prepared against him by the House of Commons, and a charge very similar to that advanced by Oates and Bedloe, was again made against him.[3]

"Whereas the said Sir William Scroggs being advanced to be chief justice of the court of King's Bench, ought, by a sober, grave, and virtuous conversation, to have given a good example to the

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[1] 8 Howell's State Trials, 170.

[2] The only recorded instance, which at present occurs to us, of a judge venturing to use an oath upon the bench, is to be found in the Year Book, 2 Henry 5. 5. cited in 11 Rep. 53 b. "A dyer was bound that he should not use the dyers' craft for two years, and there Hull held that the bond was against the common law, and, *by God*, if the plaintiff was here, he should go to prison till he paid a fine to the king."

[3] 8 State Trials, 200.

king's liege people, and to demean himself answerable to the dignity of so eminent a station; yet, he, the said Sir William Scroggs, on the contrary, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, doth daily affront Almighty God, dishonor his majesty, give countenance and encouragement to all manner of vice and wickedness, and bring the highest scandal on the public justice of this kingdom."

This impeachment, some articles of which were probably well-founded, fell to the ground on the dissolution of the Parliament, and Scroggs, escaping the punishment which was his due, died at his house in Essex-street of a polypus of the heart.

The immoralities of this man have been commemorated by Roger North, both in the *Examen*,[1] and in the Life of his brother the Lord Keeper. "His debaucheries," says he, in the latter work, "were egregious, and his life loose, which made the Lord Chief Justice Hales detest him. He was a great voluptuary, and companion of the high court rakes, as Ken, Guy, &c. whose merits for aught I know might prefer him." The character of Scroggs, given by Burnet, agrees in all essential particulars with that just cited from Roger North. "He was," says Burnet, "a man more valued for a good readiness in speaking well, than either for learning in his profession, or for any moral virtue.—His life had been indecently scandalous, and his fortunes were very low. He was raised by the Earl of Danby's favor, first to be a judge. and then to be chief justice; and it was a melancholy thing to see so bad, so ignorant, and so poor a man raised to that great post."

The successor of Scroggs in the office of chief justice was Sir Francis Pemberton, a man whose many bad qualities we feel inclined to overlook, when we remember, that he had still sufficient virtue to fall under the displeasure of the Court. "In his youth," says Burnet, "he mixed with such lewd company, that he quickly spent all that he had, and ran so deep in debt, that he was cast into a jail where he lay many years, but he followed his studies so close in the jail, that he became one of the ablest men of his profession." A similar account of his early life is given by Roger North. "This man's morals were very indifferent, for his beginnings were debauched, and his study and first practice in the jail. For having been one of the fiercest town rakes, and spent more than he had of his own, his case forced him upon that expedient for a lodging; and there he made so good use of his leisure, and busied himself with the cases of his fellow-collegiates, whom he informed and advised so skilfully, that he was reputed the most notable fellow within those walls, and at length he came out a sharper at the law."[2]

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[1] Retrospective Review, vol. viii. p. 17.

[2] Life of Lord Guilford, ii. 123.

Having been released from jail, his learning soon procured him practice, and he was made a serjeant, and in 1679, a puisne judge of the King's Bench. Although Pemberton was sufficiently unprincipled and profligate to meet the views of the Court, he yet appears to have been wanting in zeal for the prerogative, which was probably the cause of his being displaced the year after his appointment. The Court, however, finding it difficult to discover a man at once so learned, and so licentious, resolved again to employ him, and he was, therefore, shortly after his removal, raised to the chief seat in the King's Bench. Pemberton, according to Roger North, was a better practiser than a judge, and was too much inclined to exercise the prerogatives of a legislator. "He had," says that writer, "a towering opinion of his own sense and wisdom, and rather made than declared law." The Lord Keeper Guilford used to say of him, that in making laws, he had outdone kings, lords, and commons. When the great case of the *Quo warranto* against the city of London was about to be tried, it was not thought proper to trust Pemberton with the conduct of so important an affair, and he was accordingly removed from the King's Bench to make room for Saunders, and was made chief justice of the Common Pleas.—"It was not," says Roger North, "thought any way reasonable, to trust that cause on which the peace of the Government so much depended, in a court where the chief never showed so much regard to the law as to his own will, and notorious as he was for little honesty, boldness, cunning, and uncontrolable opinion of himself." While chief justice of the Common Pleas, it was his duty to preside at the trial of Lord Russell, and his conduct upon this occasion is thought to have given great displeasure to the Court. It is certain that in the same year he was deprived of his office, and removed from the Privy Council. No lawyer ever underwent such a variety of fortune as Pemberton. Raised from his jail practice to a puisne seat in the King's Bench, he had in the interval between his removal from that office, and his appointment to the chief justiceship, returned to his practice at the bar; and now on his second degradation, he again resumed his station as serjeant. "By that, as it seems the rule is, he lost his style of lordship, and became bare Mr. Serjeant again. His business lay chiefly in the Common Pleas, where his lordship (North) presided, and however some of his brethren were apt to insult him, his lordship was always careful to repress such indecencies, and not only protected but used him with much humanity. For nothing is so sure a sign of a bad breed as insulting over the depressed."[1]

Sir Thomas Jones, whose name was connected with the proceedings in Parliament against Scroggs, perhaps exhibits, in some respects, a favorable specimen of the judicial character at this period,

[1] Life of Lord Guilford, ii. 125.

though he was a partner in the scandalous conduct of North on Colledge's trial. "He was a very reverend and learned judge, a gentleman, and impartial, but being of Welsh extraction, was apt to warm, and when much offended, often showed his heats in a rubor of his countenance, set off by his grey hairs, but appeared in no other disorder, for he refrained himself in due bounds and temper, and seldom or never broke the laws of his gravity."[1]

In the year 1683, Jones was appointed chief justice of the King's Bench, an office which he held until 1686, when he was displaced by James II. In pursuing his insane project of introducing the Catholic Religion into this kingdom, James considered it essentially necessary that he should secure the coöperation of the judges, in order that he might by their opinions sanction his dispensing with the penal laws against recusants. Roger Coke, in his usual homely style, has given the following account of the king's attempt to corrupt Sir Thomas Jones:—"However herein the king stumbled at the threshold; for it is said he began with Sir Thomas Jones, who had merited so much in Mr. Cornish his trial, and in the West; yet Sir Thomas boggled at this, and told the king he could not do it; to which the king answered, he would have twelve judges of his opinion, and Sir Thomas replied, he might have twelve judges of his opinion, but would scarce find twelve lawyers. The truth of this I have only from fame, but I am sure the king's practice in reforming the judges, whereof all (except my Lord Chief Baron Atkins, and Justice Powel) were such a pack as never before sate in Westminster Hall, gave credit to it."[2] Roger Coke's account of this transaction is confirmed by Sir John Reresby.

"This day, April 29, 1686, being the first of the term, a great change was made among the judges in Westminster Hall. There was a new chief justice of the Common Pleas, and another new judge of the same bench; there was a new chief baron; in fine, four new judges of the several Courts. This made a considerable noise, as the gentlemen now displaced were of great learning and loyalty, and whose only crime had been, they would not give their opinions as several of their brethren had done, that the king by his prerogative might dispense with the test required of Roman Catholics. The next day I was informed by Mr. Jones, son to the chief justice of that name lately turned out, that his father, upon his dismission, observed to the king, that he was by no means sorry that he was laid aside, old and worn out as he was in his service; but concerned that his majesty should expect such a construction of the law from him as he could not honestly give; and that none but indigent, ignorant, or ambitious men would give their judgment as he expected; and

[1] Examen, p. 563.

[2] Coke's Detection, &c. ii. 434.

that to this his majesty made answer, — it was necessary his judges should be all of one mind."

We must not omit the following portrait, by Roger North, of Weston, at this time one of the Barons of the Exchequer.

"He was a learned man, not only in the common law, wherein he had a refined and speculative skill, but in the civil and imperial law, as also in history, and humanity in general. But being insupportably tortured with the gout, became of so touchy a temper, and susceptible of anger and passion, that any affected or unreasonable opposition to his opinion would inflame him so as to make him appear as if he were mad; but when treated reasonably, no man was ever more a gentleman, obliging, condescensive, and communicative than he was. Therefore, while a practiser, he was observed always to succeed better in arguing solemnly, than in managing of evidence; for the adversary knew how to touch his passions, and make them disorder him and then take advantage of it. But at the bottom he was as just as the driven snow; and being a judge, for which office he was fit, because he had neither fear, favor, nor affection; besides his judgment, he would often in his charges shine with his learning and wit. He was one of a clear conduct, by principle honest and just, and, as we find in the best of that character, so he was intrepid, and feared not the face of all human kind. He made no ceremony of flying in the face of faction, at all turns; and being one of those they call prerogative men, inaccessible and unalterable, he was hated bitterly by the party."

Amongst the most eminent of that very small body of men, the anti-court lawyers of the reign of Charles II., was Sir William Jones, who for some time filled the office of attorney-general. Having finished his studies at Gray's Inn, his learning and great acquirements soon brought him into practice in the King's Bench, and were ultimately the means of raising him, notwithstanding his popular principles, to the high post of attorney-general. Ambition appears to have been Jones's foible in the earlier part of his legal career, and probably induced him to accept an employment which could not be altogether consonant to his principles. When Sir Heneage Finch, the solicitor-general, was appointed attorney on the death of Sir Geoffrey Palmer, a contest for the vacant office ensued between Jones and Sir Francis North, the latter of whom ultimately prevailed; but Jones, by the influence of the Duke of Buckingham, was knighted and made king's counsel. Having been appointed attorney-general before the discovery of the Popish plot, he took a very conspicuous part in the prosecution of the supposed offenders, particularly in the case of the unfortunate Lord Stafford. "If I may have leave to

guess," says Roger North, "the greatest load of all that sate upon and oppressed his spirits, was his undue fervor in prosecuting him to death for high treason upon the foot of Oates's plot.[1] With all the charity of a political opponent, North supposes Sir William Jones to have been "at the bottom of the whole stratagem" of the Popish plot, but he was certainly too honest a man to lend himself knowingly to so enormous a villainy. Like the other anti-court politicians of that day, he appears to have been infected with the panic which Oates spread over the whole nation. On the first opening of the plot, his apprehensions were so great, that he despatched an express from Hampstead, where he was then residing, to his town house, to have all the billets of wood removed out of his cellar into his back yard, lest the Papists should throw fire-balls into his cellar and set his house on fire. Growing weary of his official duties, Jones resigned the place of attorney; and, although (according to Burnet, who was acquainted with him,) he was offered the seals, he refused them. In promoting the bill of exclusion against the Duke of York, Sir William Jones exerted himself most strenuously; and it is probably, in allusion to his conduct upon this occasion, that he is described by Dryden in *Absalom and Achitophel*, as

> "Bull-faced Jonas, who could statutes draw
> To mean rebellion and make treason law."

Sir William Temple, referring to the same subject, adds, "And this person having the name of the greatest lawyer in England, and commonly, of a very wise man; besides this, of a very rich, and of a wary or rather timorous nature, made people generally conclude, that the thing was certain and safe, and would at last be agreed on all parts, whatever countenance were made at court." When Sir William Temple was employed to carry the king's message against the Exclusion bill, to the House of Commons, Jones observed to him, "that for himself, he was old and infirm, and expected to die soon."—"But you," said he, "will, in all probability, live to see the whole kingdom lament the consequences of this message you have brought from the king."

Roger North, in his character of Sir William Jones, has displayed more impartiality than is usually to be found in his sketches of his great contemporaries.

"He was a person of a very clear understanding, and, if possible, clearer expression; wherein he was assisted by an extraordinary opinion he had of both, as also of his own general worth, for that was his foible. He was extremely proud and impatient of competition, and much more of his being left behind, as it was his chance

[1] Life of Lord Guilford, vol. i. 96.

to be, in the course of his preferment, whereby he missed of his desired post. And that partly occasioned a sort of restlessness, which made him commit several gross errors in the main chances of his life. His felicity was never to be disturbed in speaking, nor by any audience or emergence put by the forecast and connection of his thoughts: but dilated with a constancy, steadiness, and deliberation admirable in his way, so that in speaking as counsel, one might mistake him for the judge. He affected somewhat of the rustic phrase of his own country, which was Gloucestershire, as to instance in a word, *althoff*, instead of although as we pronounce it, which was no disadvantage but rather set him off. * * * He affected also general learning, as history and theology; and as great men usually have their vanities, his was to profess of that sort more than belonged to him, and accordingly he chose his company, who were for the most part divines, such as were most eminent in his time, as Tillotson, &c. I dare say they profited more in his company than he in theirs. I have touched his felicity; his infelicity was a *penchant* toward the anti-court, or rather, republican party, and consequently must be a favorer of non-conformity, for opposites to government of all kinds seem to make but one party."

In the annals of the English bench no one has filled a more prominent station than Sir George Jefferies, whose very name has passed into a bye-word, significative of every quality which can disgrace the judicial character. In a former volume[1] we presented to our readers the able and vivid portrait of this odious man, which Roger North has drawn; and we shall, therefore, on the present occasion, confine ourselves to some anecdotes of him collected from other sources. Jefferies was descended from a Welsh family of some consideration; his grandfather having been one of the judges of North Wales. He was educated at Westminster school, from whence, without having received the benefit of a residence at either of the Universities, he removed to the Temple, and applied himself assiduously to the study of the law; "though in an obscure and mean apartment, his allowance being only forty pounds a year, and that from an old grand-mother, while his father, upon pretence of the numerousness of his family, but more indeed out of a near and covetous nature, scarce contributed ten pounds a-year more towards his clothing; a very scanty income put together for the support and carrying of a young gentleman through so genteel and expensive a study."[2] The scantiness of his fortune at this time was, we are told,

[1] Retrospective Review, vol. ii. p. 251.

[2] "The Exhibition" allowed Francis North, afterwards Lord Keeper Guilford, by his father, was 60*l.* per annum. In addition to this, he had twenty pounds a year from his grandfather, and picked some pence by court-keeping. Life of Lord Guilford, i. 49. In Sir John Fortescue's time, "no student could be maintained for less expenses by the year than twenty marks." Fortescue De Laudibus, &c. c. 49.

supplied by Jefferies's own ingenuity, "which ever suggested some shifts or other to him," until he began to support himself by his practice.

It has been asserted, that Jefferies was never regularly called to the bar, but that "having by some means or other, got a bar gown on his back, he began to practice with considerable success. He even braved the plague for the sake of briefs; and in the year 1666, came into notice at the Kingston assizes, at which, on account of the pestilence, very few counsel had the boldness to make their appearance."

Having given some manifestations of qualities highly favorable to the views of the court, Jefferies was selected as a person worthy of promotion; and he was accordingly appointed a Welsh judge and knighted. His next elevation was to the chief justiceship of Chester, in the year 1680, and in the same year he was made serjeant and a baronet. The office of recorder was also conferred upon him by the city of London, in return for which favor he is said to have been one of the chief advisers of the Crown, in the case of the *Quo warrantos* against the corporation of that city; and on the death of Sir Edmund Saunders, who had been raised to the bench expressly with a view to the settlement of that question, Jefferies was, in September 1683, sworn lord chief justice of the King's Bench. The temper and qualities of Jefferies now began to develope themselves more fully, and the subserviency which had marked his former conduct was changed into haughtiness and insolence. When at the bar, a certain decency of carriage was necessarily observed by him, but now that, raised to the bench, there was no superior to check the ebullitions of his insolent passion, he indulged in the most disgraceful language; "so much Billingsgate towards the prisoners at the bar," observes a legal biographer, "cannot be paralleled in history." Roger North has left us a few specimens of *the licks which he used to give with the rough side of his tongue*, and to these we shall add a few more by way of illustrating the manners of the bench at this period. The trial of Sir S. Barnadiston[1] affords a good instance, both of the style of language used by Sir George Jefferies, and of the court principles which he professed. In adverting to the trial of Russell and Sidney, "names," to use the words of Mr. Fox, "ever dear to every English heart;" the chief justice expressed himself with an inhuman and disgusting irony which nothing can surpass.

"Then here is as I said, the sainting of two horrid conspirators; here is the Lord Russell sainted, that blessed martyr, my Lord Russell, that good man, that excellent protestant, he is lamented! and what an extraordinary man he was, who was fairly tried and justly

[1] 9 State Trials, 1353.

convicted and attainted for having a hand in this horrid conspiracy against the life of the king, and his dearest brother his Royal Highness, and for the subversion of the government. And here is Mr. Sidney sainted! What an extraordinary man he was! Yes, surely, he was a very good man, because you may some of you remember, or have read the history of those times, and know what share Mr. Sidney had in that black and horrid villainy, that cursed treason and murder, the murder, I mean, of King Charles I., of blessed memory, a shame to religion itself, a perpetual reproach to the island we live in, to think, that a prince should be brought, by pretended methods of law and justice, to such an end at his own palace. And it is a shame to think that such bloody miscreants should be sainted and lamented, who had any hand in that horrid murder and treason; and who, to their dying moments, when they were on the brink of eternity, and just stepping into another world, could confidently bless God for their being engaged in that good cause (as they call it), which was the rebellion which brought that blessed martyr to his death. It is high time for all mankind, that have any Christianity, or sense of heaven or hell, to bestir themselves to rid the nation of such caterpillars, such monsters of villainy as these are."

When the counsel for Baxter (who had been imprisoned for his *Paraphrase on the New Testament*) moved for further time to prepare for trial, the chief justice told him, that "he would not give him a minute more to save his life;" adding, "that they had to do with other sorts of persons, but now they had a saint to deal with, and he knew how to deal with saints as well as sinners. Yonder (he continued) stands Oates in the pillory (as he actually did in New Palace Yard), and says he suffers for the truth; and so says Baxter; but if Baxter did but stand on the other side of the pillory with him, I would say two of the greatest rogues and rascals stood there." Baxter was tried soon afterwards; but Jefferies brow-beat his counsel and witnesses to such an excess, that they were almost terrified from their duty. The taunting and ironical style adopted by him, in speaking of Russell and Sidney, was employed again with great effect on the trial of Baxter, whom the chief justice hated as a dissenter. On the prisoner attempting to address the court, Jefferies exclaimed,—

"Richard, Richard! dost thou think we will hear thee poison the court? Richard, thou art an old fellow, an old knave; thou hast written books enough to load a cart, every one is as full of sedition (I might say treason), as an egg is full of meat; hadst thou been whipt out of thy writing trade forty years ago it had been happy. Thou pretendest to be a preacher of the gospel of peace, and thou hast one foot in the grave; it is time for thee to begin to think what

account thou intendest to give; but leave thee to thyself and I see thou wilt go on as thou hast begun; but by the grace of God, I'll look after thee.—I know thou hast a mighty party, and I see a great many of the brotherhood in corners, waiting to see what will become of their mighty Don; and a doctor of the party (looking to Dr. Bates) at your elbow, but by the grace of Almighty God I will crush you all."[1]

The man upon whom this scurrilous attack was made was a learned and pious person, to whom the Bishopric of Hereford had been offered by Clarendon, but refused on account of conscientious scruples. "He was a man," says Mr. Fox in his historical work, "of exemplary character, always remarkable for his attachment to monarchy, and for leaning to moderate measures in the differences between the church and those of his persuasion." We may imagine, when a person of this character was thus scandalously treated by Jefferies, what his conduct was when prisoners of less consideration stood before him. The real offence which Baxter had committed in the eyes of his judge, was his venturing to dissent from the church of England. A presbyterian was this judge's especial abhorrence. Thus, on the trial of the Lady Alice Lisle, when the prisoner, speaking of Mr. Hicks, said, that she did not in the least suspect him to be in the army, being a presbyterian minister, that used to preach and not to fight, the chief justice uttered a furious anathema against such schismatics.

"But I will tell you, there is not one of those lying, snivelling, canting presbyterian rascals, but one way or other had a hand in the late horrid conspiracy and rebellion; upon my conscience, I believe it; and would have been as deep in the actual rebellion, had it had any little success, as that other fellow Hicks; their principles carry them to it; presbytery has all other of villainy in it; nothing but presbytery could lead that fellow Dunne to tell so many lies as he has here told; for show me a presbyterian, and I will engage to show a lying knave."[2]

The manner in which Jefferies was accustomed to comport himself towards the counsel of the prisoners who were tried before him, may be seen by a reference to Baxter's trial. It is to be observed, that the only report of this trial was taken by the friends of the accused; but, on the face of it, there is every mark of authenticity.

"Mr. Wallop (Baxter's counsel) said, that 'he conceived the matter depending, being a point of doctrine, it ought to be referred

[1] 9 State Trials, 1353.

[2] 11 State Trials, 359.

to the bishop his ordinary; but if not, he humbly conceived that the doctrine was innocent and justifiable, setting aside the *innuendoes*, for which there was no color, there being no antecedent to refer them to,' (that is, no bishop or clergy of the church of England named) * * * * 'My lord,' says he, 'I humbly conceive, the bishops Mr. Baxter speaks of, as your lordship, if you have read church history, must confess, were the plagues of the church and the world.'—'Mr. Wallop, (says the lord chief justice) I observe you are in all these dirty causes; and were it not for you gentlemen of the long robe, who should have more wit and honesty than to support and uphold these factious rogues by the chin, we should not be at the pass we are at.'—'My lord, (says Mr. Wallop) I humbly conceive that the passages accused are natural deductions from the text.'—'You humbly conceive! (says Jefferies) and I humbly conceive! Swear him, swear him!'—'My lord, (saith he) under favor, I am counsel for the defendant; and if I understand either Latin or English, the information now brought against Mr. Baxter upon so slight a ground, is a greater reflection upon the church of England than anything contained in the book he is accused for.' Says Jefferies to him, 'sometimes you humbly conceive, and sometimes you are very positive; you talk of your skill in church history, and of your understanding Latin and English; I think I understand something of them as well as you; but, in short, I must tell you, that if you do not understand your duty better, I shall teach it you;' upon which Mr. Wallop sat down."[1]

The iniquities committed by Jefferies in the West, after Monmouth's rebellion, must be too deeply imprinted upon the indignant memory of every one, to require any details of them in this place. In reading the dark pages of our history, which disclose these transactions, it is difficult to determine whether Jefferies or his employer is most justly entitled to our execration. It appears that James was accustomed to call this bloody progress of the chief justice, "Jefferies's campaign." "My lord chief justice," he observes, in one of his letters, "has almost done his campaign—he has already condemned several hundreds, some of which are already executed, more are to be, and the rest sent to the Plantations." It has been properly remarked, by the late learned editor of the *State Trials*, that his majesty's brutality, in calling Jefferies's circuit a campaign, is somewhat extenuated by the fact, that the chief justice actually had, upon that occasion, a military commission.[2]—And, in confirmation of that circumstance, we have likewise the authority of Roger North. "After he (Monmouth) was beaten at Sedgmore, the lord chief justice Jefferies performed his memorable expedition in the West, armed

[1] 11 State Trials, 498.

[2] See Ralph, 888.

not only with a commission of Oyer and Terminer, but also an authority to command the forces in chief, as General of the West, for so he was styled."[1]

We have not space to follow Jefferies through the whole of his iniquitous course, but we must not omit to mention the opinion entertained by him of his brother judges. We are told, in the *Diary* of Henry, Earl of Clarendon, that in a confidential conversation which he held with Jefferies, then chancellor, on the affair of the bishops, Jefferies asserted that most of the judges were rogues. Soon afterwards, upon another occasion, he expressed himself in similar terms, at the same time calling chief justice Wright *a beast*.[2]

We shall only add the concluding scene of Jefferies's life, as given by the writer of the *Lives of the Chancellors*.

"The Lord Jefferies' fate, as well as that of his master, King James, came on apace: for the Prince of Orange being landed, advanced towards London without opposition, and the king having taken the seal from the chancellor, left him in the lurch, and withdrew privately on the 10th of December, in the dead of the night, down the Thames, in order to go for France. The great seal was afterwards found by a fisherman, in the Thames; and the chancellor now without protection, having rendered himself obnoxious to most people, and being perfectly hated by the nation, on Monday, between three and four in the morning, withdrew; and having, in disguise, got down safe to Wapping, put himself on board a collier, which was pretended to be bound for Newcastle, but indeed was designed for Hamburgh; but some persons having notice thereof by the means of the mate, they went to a justice for a warrant to apprehend him; but he thought fit to put them off, whereupon they applied themselves forthwith to the lords of the council, who granted them a warrant, and they went immediately to search the ship; but on Tuesday night, not thinking himself safe on board the collier, in which he was to pass, he lay in another ship hard by, so that those who came that day to search for him, missed of him on board, but had information given them that he was hard by, at a little peddling ale-house, where accordingly they found him, being the sign of the *Red Cow*, in Anchor and Hope Alley, near the King Edward Stairs; from whence they immediately hurried him in a coach, guarded with several blunderbusses, to the Lord Mayor's, where the crowd was so great, and the rabble so numerous, all crying out together, *Vengeance! Justice! Justice!* that the Lord Mayor was forced to come out into his balcony, and with his hat in his hand, desired the people to go away and keep the peace, and did promise them that he had already sent to the lords of the council about the matter, and

[1] Life of Lord Guilford, vol. ii. p. 200.

[2] See Diary, p. 52.

that they should have justice done them, and that, in the meantime, their prisoner should be safely guarded; whereupon the people withdrew: and soon after, my lord, under a strong guard, was sent to the lords of the council, who committed him to the Tower, where he continued to the 18th April, 1689, when he was freed by death from his earthly confinement. He had, for some years before, been subject to terrible fits of the stone, which in all probability now accelerated his death; though others gave out that he abandoned himself to excessive drinking, thinking to support his sinking spirits by it, and that that helped forward to put a period to his life. He was buried privately in the Tower, the Saturday-night following, by an order his relations got from King William."[1]

On reviewing the characters of the persons who, between the restoration and the revolution, filled the highest judicial situations in this country, it is impossible not to be struck with the want of public principle, and too frequently of private virtue, which the majority of them exhibit. At every period of our history, the Bench has displayed a decided inclination to support the prerogative; an inclination which has been in general manifested with modesty and discretion; but in the reign of Charles II. and his successor, the judges did not hesitate openly to throw themselves into the arms of the Court. It was not a bias in favor of the Crown which they exhibited; they became the eager and shameless advocates of its most unconstitutional pretensions. Immediately upon the return of Charles, the bench was indeed, as we have already remarked, filled with men of some moderation and honesty. The picture given by Clarendon may perhaps be considered somewhat overcharged: — "All the courts of Westminster Hall were presently filled with grave and learned judges, who had either deserted their profession or practice during the rebellious times, or had given full evidence of their affection to the king and the established laws in many weighty instances: and they were then quickly sent in their several circuits, to administer justice to the people, according to the old forms of law, which was universally received and submitted to with all possible joy and satisfaction. * * * Denied it cannot be, that there appeared sooner than was thought possible, a general settlement of the civil justice of this kingdom; that no man complained without remedy, and every man dwelt again under the shadow of his own vine, without any complaint of injustice and oppression."[2]

Clarendon was well aware, that the attempt to establish the high prerogatives of the throne upon the ruins of the judgment-seat, must necessarily be unsuccessful; and he therefore employed his influence to preserve some degree of purity in the administration of

[1] Lives of the Chancellors, i. 185.

[2] Clarendon's Life, vol. ii. p. 42.

the laws. His disgrace, however, removed the only restraint upon the corrupt measures of the Court, and Westminster Hall soon exhibited the spectacle of a bench of judges holding *durante bene placito*, and for the most part scrupulously attentive to the nature of their tenure. The consequence of this system has been so well described by Mr. Booth, afterwards Lord Delamere, that we shall venture to repeat the passage: — "Our judges have been very corrupt and lordly, taking bribes, and threatening juries and evidence, perverting the law to the highest degree, turning it upside down, that arbitrary power may come in upon their shoulders. The cry of their unjust dealings is great, for every man has felt their hand." The creed of the crown lawyers of this day is to be found in the writings of Roger North: — "I must needs say, that the prerogative of the Crown is a doctrine so constantly recommended in the law books, that a man cannot be an honest learned lawyer, but he must be, in the popular sense, a prerogative man, and, in every sense, a hater of what they call a republic." — Acting under the influence of these principles, it is not surprising that the judges should have "turned the law upside down, that arbitrary power might come in upon their shoulders." The state of England, at this period, is so well described in the following paragraph, that with it we shall conclude the present article.

"No man who wished well either to the church, or the laws of England, was safe from the informations of mercenary wretches: fictitious conspiracies were every day hatched, and judges and juries were so corrupted, that the one gave their opinions, and the other their verdicts, according to the directions they received from Court. No man was safe in his innocence, nor secure in his property; and trials and proceedings, which should have been exactly consonant to law and reason, to justice and mercy, were become only a mere solemn and ceremonious method of completing our ruin. It hath been thought an offence against the very law of nations, to poison a fountain of which even an enemy was to drink: how great a crime then must it be, and how near a kin to sacrilege, to corrupt the laws which are the very fountains and springs of political life, and to make them the instruments of oppression and wrong, which should be our greatest security and relief."[1]

[1] A Charge given at the General Quarter Sessions of the Peace for the County of Surrey, by the Hon. Hugh Hare. 1692.

RECENT AMERICAN DECISIONS.

District Court of United States for Massachusetts.

December Term, 1862.

UNITED STATES *v.* CLARK.

Where the prisoner in order to induce one H. to enlist made representations to him as to the means and facilities of deserting, and after he had enlisted received the whole of his bounty money, and at the times when he made such representations and received the money he believed they would be likely to cause H. to desert, and they did cause him to desert, the prisoner may be deemed to have procured or enticed him to desert, within the meaning of the statute of 1812, ch. 14. § 17.

It is not necessary in order to warrant a conviction that the prisoner should have wished or intended that H. should desert.

This was an indictment under the statute of 1812, chapter 14, section 17, charging the prisoner with having enticed and procured a soldier by the name of Hayden to desert.

It appeared that early in November last, Hayden enlisted as a soldier, received a bounty of twenty-five dollars from the United States, and one hundred dollars from the city of Boston, and was immediately mustered in to service and sent to the camp in Cambridge; he there remained doing duty as a soldier about a fortnight, and then deserted. There was evidence tending to show that just previous to the enlistment the prisoner in a conference with Hayden told him that if he would enlist he could obtain the bounty and avoid serving as a soldier by deserting; that he could either obtain a furlough and then desert, or that the prisoner would come to the camp and take him away in a wagon; that immediately after this conversation Hayden went with the prisoner to the rendezvous, enlisted, received the bounty, and immediately delivered the whole amount to the prisoner. There was also evidence tending to show that the prisoner was to hold a part of the bounty for Hayden, and keep the residue for his own use.

SPRAGUE J. in charging the jury, among other things instructed them as follows:

That if the prisoner procured Hayden to enlist believing at the time that he would probably desert, still if the prisoner did not say or do anything which would be likely to cause him to desert, or if what was said and done by the prisoner did not in fact cause Hayden to desert, then the prisoner is not guilty of the offence charged. But that it was not necessary in order to establish the guilt of the prisoner that the government should satisfy the jury that he wished

or actually intended that Hayden should desert. It may be that his wishes and purposes went no further than to cause Hayden to enlist, and thereby to obtain for himself the reward for furnishing a recruit, and a part or the whole of the bounty money. It may be that he would have really preferred that Hayden should not be able to escape from the service. Still, if in order to induce Hayden to enlist to accomplish his own purpose of gain the prisoner made representations and gave assurances to Hayden as to the means and facilities of deserting, and after Hayden had enlisted received from him his bounty money, and at the time when such representations were made assurances given and bounty money received, the prisoner believed that they would be likely to cause Hayden to desert, and they did cause him to desert, then the prisoner may be deemed to have procured or enticed him to desert within the meaning of the Statute.

Verdict, guilty.

T. K. Lothrop for United States.
B. F. Russell for the prisoner.

Supreme Judicial Court of Massachusetts.

Suffolk, October Term, 1859.

MARTHA DONALDSON *v.* THE CITY OF BOSTON.

In an action of tort against a town for damages alleged to be occasioned by a defect in a street, evidence that the obstruction was in the street on the day previous, (it appearing that the obstruction was removed during the night, and placed anew in the street the next morning,) is irrelevant, and immaterial to the issue.

The existence of a previous defect or nuisance which has been removed, has no tendency to prove a subsequent one or to show notice to the town that another similar obstruction will be created.

Where the statute requires reasonable notice to a town of the existence of a defect to render them liable to an action for damages, mere proof of notice to one or more of the inhabitants does not establish the requisite notice.

To establish such notice the facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper vigilance and care might have known of it.

This was an action of Tort: and the plaintiff claimed damages for injuries received from falling into a plumber's furnace, about a foot high and a foot in diameter, placed on the sidewalk, in Southac Street, in the city of Boston, by which the plaintiff was severely burned. For the purpose of proving reasonable notice to the city, as required by the statute, the plaintiff introduced evidence tending to show that the furnace was placed on the sidewalk, about half-past seven o'clock in the morning of the day on which the injury was received; and that it remained there until five minutes before

nine o'clock, when the injury was received; that between those hours, a very large number of citizens of Boston passed through said street, and the furnace in or near the middle of the sidewalk, with a fire in it, obstructed the free passage of such citizens. In further proof of notice, the plaintiff offered to show, that the furnace was in the same place, on the sidewalk, with a fire in it, from about two o'clock in the previous afternoon, until the close of work by the plumber, being a period of not less than five hours; that it was used on the second day, in completing the job of work, commenced on the former day, which was the soldering of an ice-chest in a grocer's shop; that the police officer, whose duty it was to pass through that street, and to remove or complain of all obstructions, was accustomed to pass through that part of the street in which the furnace was placed, daily, between eight o'clock in the morning, and the hour when the injury was received, and at certain other hours in the afternoon, during the time in which the furnace was placed as aforesaid.

The defendant objected to the admission of this evidence, and the Court ruled that it was inadmissible for that purpose, and excluded it. There was no affirmative evidence that the policeman did pass through the street on that day.

The plaintiff contended, that notice to some of the principal citizens of Boston, who were tax-payers, might be reasonable notice to the defendants, within the statute. The jury were instructed, that in order to prove reasonable notice to the defendants of the alleged defect, it must appear, that the officers of the city, having charge of the streets, such as the Mayor, Aldermen, Superintendent of Streets, or Policemen, had actual notice of the defect, or that a defect, which had obstructed travel, must have continued so long, or been so notorious, that if such officers had done their duty, or citizens passing had done their duty, they would have known it; and upon the question of notoriety, the jury were instructed that they might consider whether the obstruction to travel was of such a nature, that if citizens passing had seen it, they would have been likely to have, forthwith, informed such officers of its existence.

To these instructions of the court the plaintiff excepted.

The defendants called a police officer to testify that the locus in question was in his beat, and that he did not see the furnace before the accident on the day it happened. The plaintiff then asked him if he did not, at or near the time, make certain admissions as to his being on the street, and seeing the furnace on the afternoon before, and supposing that plumbers had a license to place such in the street. He replied, that he had no recollection of such a statement, but if he did make it, it was true. The plaintiff then called a witness to prove that witness did make such statements; but the evidence was ruled out by the court.

The case was argued by *Preston* for the plaintiff, and by *Healy*, City Solicitor, for the defendant.

The opinion of the court was delivered by

Bigelow C. J.—Evidence that the furnace had been in the same place on the sidewalk of the street upon the day previous to the accident was irrelevant and immaterial to the issue. If it occasioned a defect or obstruction, its removal at nightfall abated the nuisance, and the defendants were then in no default in the performance of their duty. The street was safe and convenient until the furnace was again placed within its limits on the next day. But this was a separate and independent act by a person acting under no authority or license from the defendants occasioning a new obstruction to public travel, which had no necessary connection with that existing on the day previous, and of which the acts done on the day previous could give no notice, either actual or constructive, to the defendants. The existence of a previous defect or nuisance which has been removed has no tendency to prove a subsequent one, or to show notice to the city that another similar obstruction will be created. It was, therefore, incompetent for the plaintiff to show any facts in relation to the use of the furnace within the limits of the street on the day before the accident occurred.

For the same reason, the plaintiff could not prove the statements made by the police officer. They related solely to the fact of his seeing the furnace on the day previous; and being irrelevant and immaterial, it was not competent to contradict them for the purpose of impeaching his credit. It is only on matters material to the issue that the statements of a witness can be contradicted.

Upon the question of notice to the town, the instructions were correctly stated and properly guarded. The statute requires reasonable notice to a city or town of the existence of a defect in order to render them liable to an action for damages. Mere proof of notice to one or more of the inhabitants does not establish the requisite notice, because it is not their duty to repair the defect or remove the obstruction. The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper vigilance and care might have known it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances, which tend to show its notoriety. In the present case, taking into view the nature of the alleged defect and the brief time during which it had existed, we are of opinion that the instructions were sufficiently favorable to the plaintiff. See *Reed* v. *Northfield*, 13 Pick. 98.

Exceptions overruled.

Supreme Judicial Court of Massachusetts.[1]

JOHN LANG *v.* ANDREW P. BUNKER ET AL.

This was an action upon a poor debtor recognizance. At the trial and before the plaintiff's opening, the defendant moved to amend his answer by inserting in the certificate, "And I further certify that no justice of a court of record, police court, judge of probate, Master in Chancery, or commissioner of insolvency, could be conveniently found to attend said examination," which motion the court refused. The oath was administered by a justice of the peace and quorum, residing at Stoneham, who testified that when he was called upon to hear the matter, he was in Boston as a witness.

The court ruled that it was competent for the defendant to show by parol evidence that none of the officers named in said statute could be conveniently found. The said justice of the peace was asked what inquiries he made as to other officers named, &c., before acting; to state whether any of said officers could be conveniently found; whether he learned from any source before acting as magistrate, that the Master in Chancery, who issued the citation was away or expected to be away on the day of the hearing, all which questions were ruled out. Upon examination of several magistrates of the county, the plaintiff put certain questions, objected to by the defendant and ruled in, as whether one was at home several days prior to a certain day, or the day before; what was the distance from his office to Stoneham; whether he was sick, or able to attend an examination, on a certain day, or at leisure; also, whether the person offered as a witness was acting as a Master in Chancery in 1857? Whether he informed the defendants' counsel when he should be at home; whether he was sick, busy or engaged on a certain day? The defendants excepted to the rulings thus made.

Rescript. Exceptions overruled. "1. The court had no power to authorize or to order the certificate of the magistrate to be amended on motion of the defendant's attorney. It does not appear that the magistrate asked to make any amendment.

"2. The evidence excluded, as well as that which was admitted against the plaintiff's objection, does not furnish any valid ground of exception to the ruling of the court."

J. Q. A. Griffin for plaintiff; *Wm. P. Harding* for defendants.

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[1] Reported by George M. Hobbs, Esq.

CHLOE FARRIS *v.* W. A. RICHARDSON, JUDGE, ET AL.

Bill in equity to restrain the defendants from any further proceeding in insolvency against the estate of Newell F. Onion, an insolvent debtor, and also to vacate the proceedings already had.

The plaintiff had an attachment upon Onion's property, for a debt due her by him, and before execution was obtained he had absconded. Other creditors of his learning this fact, applied for a warrant, which was issued without the plaintiff's knowledge. She now claims that the warrant was improperly issued, because at the time thereof Onion was a minor under the age of twenty-one, and therefore not a debtor within the meaning or contemplation of the laws of the State.

Rescript. "Decree to be entered that proceedings in insolvency are adjudged invalid, and the injunction against the further prosecution of them made perpetual.

"The alleged insolvent being a minor, no valid proceedings could be had under which he could be adjudged insolvent, and his property sequestrated without the appointment of a guardian *ad litem*. No such appointment having been made, the proceedings were irregular and invalid.

"The court do not express any opinion on the more general question, whether a minor can be the subject of proceedings in insolvency *in invitum*."

J. Q. A. Griffin and *E. Pearson* for plaintiff; *J. P. Converse* for defendants.

ORIN EMERSON *v.* DARIUS STEVENS.

Action for damages for injuries from a collision on the highway. At the trial the defendant was asked, on cross-examination, if he had not said to one Perry, that he had a right to one-half of the road, and also a right, if he saw fit, to break the legs of the plaintiff's horse, if the horse stood in his way in the street.

The defendant said he did not so say. The plaintiff then proposed to contradict him on this point by the testimony of Perry. The defendant objected, but the court admitted it, and the defendant excepted.

Rescript. Exceptions overruled. "The statement of the defendant testified by Perry, was made in reference to the subject matter of the suit, and from which some inference might be drawn by the jury as to the principal facts in issue, and so was not collateral, but was admissible as evidence in chief, without reference to the defendant's denial."

W. P. Harding for plaintiff; *J. Q. A. Griffin* for defendant.

RICHARD ROONEY *v.* DENNIS GILLESPIE.

An action to recover possession of premises under landlord and tenant process. The plaintiff claimed the premises under a quit-claim deed from one Murdock, dated December 22, 1860. The defendant had received from said Murdock, December 31, 1859, a bond for a deed of the same premises, conditioned that upon payment of $400, and a mortgage to secure the balance, a deed should be delivered. The defendant paid $195, taking Murdock's promissory notes with interest, on time and on demand, for that amount, prior to date of plaintiff's deed. After the writing, but before the delivery of the deed to the plaintiff, the defendant tendered the plaintiff $100, and after this suit was brought, $200 and the notes, and also offered a proper mortgage, which tender was declined. The defendant had notice of the plaintiff's title, and the plaintiff claimed title a reasonable time before suit brought. At the time of the execution of the bond, Murdock had no record title of the premises, but had at the time of the execution of the deed. The defendant was a tenant of Murdock during the whole of the time. He contended that the action could not be maintained.

Rescript. "The defendant was tenant at will of Murdock when Murdock quit-claimed the premises to the plaintiff. By thus conveying them, Murdock terminated the defendant's tenancy, and gave to the plaintiff the right to maintain a process for recovering the premises."

James Dana for plaintiff; *T. H. Sweetser* and *Geo. W. Emery* for defendant.

RICHARD ROONEY *v.* CATHERINE REENAN.

The defendant in this case was a tenant of Gillespie, and the same facts apply.

Rescript. "The defendant held the demanded premises under Gillespie, who was tenant at will of Murdock. Murdock terminated Gillespie's tenancy by quit-claiming the premises to the plaintiff, and the plaintiff acquired the right to recover possession thereof by the statute process against the defendant. Gen. Stat. ch. 137. sec. 2."

Same counsel.

JOHN ROSS *v.* BOSTON AND WORCESTER RAILROAD.

An action of tort for injury to the property of the plaintiff, household furniture and housekeeping articles, by fire, alleged to have been communicated by the engine of the defendants.

The defendants denied that the fire was communicated by their engine; denied their liability, and insisted that the statute under which the action was brought does not apply to movable property, having no permanent location, but only to permanent property or erections, viz.: buildings and other similar property. That it does not apply to articles of personal property that may be removed with facility at the pleasure of the owner, from, or replaced in, buildings on the route without the knowledge of the corporation. That as to such articles it would apply, if at all, only to such as the defendants had knowledge of, or reasonable cause to suppose were there, so that they might insure the same.

Judgment to be entered on the verdict and on the report of the assessor for the amount of the value of all the articles destroyed by fire.

Rescript. "1. By the true construction of Stat. 1840, chap. 85, sec. 1, the defendants are liable for articles of personal property destroyed by fire caused or communicated by engines used in their service, without reference to the fact of their knowing or having reasonable ground to believe that the property was so situated as to be endangered by their engines.

"2. Evidence that the same locomotive, or the one used when the plaintiff's property was burned with similar fuel, within two weeks previously, emitted sparks that fell within the plaintiff's premises was competent, as tending to show the physical possibility that sparks would pass over that distance.

"3. Testimony concerning similar engines on other roads was competent, as tending to rebut evidence on the same subject offered by the defendants.

"4. The case was properly submitted to the jury, under instructions, which were in all respects accurate."

G. A. Somerby for plaintiff; *Geo. S. Hale* for defendants.

ELBRIDGE G. CHAPMAN *v.* INDIANA FOSTER.

This was an action upon a promissory note signed by the defendant. Defence coverture. Replication, contract in reference to her separate property. The court below ruled that if the jury were satisfied that the defendant had the bond of her sister, to convey to her in one year to her sole and separate use upon the performance of certain stipulations, &c., therein named, the farm and personal property, and she went into possession and occupation of the property, and so continued for the year, controlling and managing it as her private estate, in the absence of her husband, and she borrowed the money of the plaintiff for the purpose of enabling her to perform the conditions of the bond and secure the title to herself, and

she so used the money, and the property was conveyed to her in pursuance of the terms of the bond, then the note was a contract having relation to her separate property and business, upon which she would be liable, notwithstanding her coverture. And if she held such a bond and went into and remained in possession and management of the property under it, during the year, as her own, and borrowed the money of the plaintiff to secure the performance of the bond, it would make no difference as to the liability in this case, that the money was applied to take up a note given by her husband to her sister, at the time the bond was given to secure the sum stipulated to be paid in the bond. But if at the time the bond was given as aforesaid, the defendant's husband purchased the personal property on the farm, taking the title to it in himself, and gave the note referred to in the case in payment therefor, and the defendant borrowed the money of the plaintiff to take up this last mentioned note, and did so, then the note in suit would not be a contract relating to her separate property and business, and she would not be personally liable upon it.

Rescript. Exceptions overruled. "The instructions and rulings at the trial were in all respects correct. The money borrowed of the plaintiff was used by the defendant to perform a contract made respecting her sole and separate business. The fact that the obligee had the note of the husband, and that the money was applied to take up the note, does not change the nature of the transaction."

Sweetser & Gardner for plaintiff; *W. P. Webster* for defendant.

LYDIA M. RAND *v.* TOWN OF NEWTON.

Rescript. Exceptions sustained and verdict accepted. "The question asking the opinion of the witness was not admissible, because it was not confined to the land in controversy. So far as it was intended merely to ask the witness on cross-examination, and not for the purpose of eliciting evidence for the consideration of the jury, its rejection by the presiding officer is not the subject of exception."

Josiah Rutter for plaintiff; *Isaac S. Morse* for defendants.

WILLIAM BENSON *v.* MALDEN & MELROSE GAS-LIGHT CO.

Rescript. Exceptions sustained. "If a vessel chartered by the plaintiff, or otherwise in his lawful possession, and navigated by him, was caught upon the gas pipe of the defendants, which was a nuisance and unlawful impediment to navigation in Mystic River, the plaintiff being in the exercise of due care, and he was obliged to

incur expense to get the vessel over the gas pipe, this would be a peculiar damage, differing not merely in degree, but in kind, from such as are common to all persons navigating the river, and would support the plaintiff's declaration."

J. Q. A. Griffin for plaintiff; *H. W. Muzzey* for defendants.

WILLIAM BENSON *v.* JAMES C. CURTIS.

Action upon a contract in writing admitted to have been fulfilled, except that $4.50 was due. But the plaintiff offered to prove that at the time the contract was executed, but before it was signed, the parties believed that only 1300 squares of earth would have to be removed to complete the job; that this belief was based on the surveyor's calculation, (whose plan was referred to,) given by the defendant to the plaintiff; that the defendant orally promised, that if the plaintiff had to remove more than the amount above stated, he would pay a certain price per square beyond the sum named in the contract; that the plaintiff, relying upon this statement and verbal promise, signed the contract, after which and before the parties left the room the defendant repeated his promise. The plaintiff further offered to prove that both parties were mistaken as to the amount required to be removed; that in fact it required 1561 squares; that the calculation alleged to have been made by the surveyor was not made by him; but no proposal was made to show that the defendant made the statement respecting the calculation with any intent to mislead, deceive or defraud the plaintiff. The evidence was rejected, the plaintiff being concluded by the written agreement.

Rescript. Exceptions overruled. "The parol evidence related to the same subject matter as that embraced in the written contract, and tended to vary the latter, by showing that a greater sum was to be paid for the work to be done by the plaintiff under the written contract than was therein stipulated."

J. Q. A. Griffin for plaintiff; *C. Robinson, jr.*, for defendant.

DENNIS CAVANAGH *v.* JAMES DOOLEY.

Action upon a building contract. Differences having arisen between the parties, each selected a referee to settle them. The referees being unable to agree, they mutually selected a third, who failed to attend. The person selected by the plaintiff refused to act further in the premises, and no further action was taken by either party with regard to settlement by reference. This suit was then brought, and the defendant claimed that this action could not

be maintained, the parties having agreed in their contract upon a special remedy in case of disagreement. The court ruled otherwise, and defendant excepted.

Rescript. Exceptions overruled. "The proceedings as to referees and the stipulations to refer do not constitute any legal defence to this action."

S. H. Folsom for plaintiff; *W. P. Webster* for defendant.

MICHAEL KING *v.* WARREN GREEN.

An action of tort for the conversion of a watch. The plaintiff with another hired a horse and carriage of one Wright, for whom the defendant worked, upon Sunday, for two or three hours, paying therefor one dollar. The letting and hiring were not for works of necessity or charity. They retained the horse and carriage some ten hours, and upon their return the defendant demanded three dollars additional pay, for the use; but having no money, the defendant took the plaintiff's watch as security for the debt. Demand and refusal before action brought. The court below ruled that if the plaintiff delivered the watch voluntarily as security for the payment of his debt, the defendant would have no lien on the watch, because it was given to secure the payment of an illegal contract. Defendant excepted.

Rescript. Exceptions overruled. "The plaintiff having delivered the watch to the defendant voluntarily, cannot maintain this action by proving an illegal contract to which he was a party."

W. P. Harding for plaintiff; *S. G. Nash* for defendant.

JEDEDIAH ESTES *v.* BENJAMIN MANSFIELD.

An action upon a promissory note by the endorsee against the maker. After the suit was brought, the parties entered into a written agreement of reference upon which an award was returned. At the trial the signature and endorsement, the submission, and making and signing of the award, were admitted. The defendant contended that having admitted the execution of the submission and award, the plaintiff's remedy upon the note was merged and barred by the submission and award, and that the action could not be maintained.

Rescript. "The award was not binding on the plaintiff, and constituted no bar to the action on the note."

W. P. Harding for plaintiff; *J. P. Converse* for defendant.

ALFRED BOYNTON *v.* DANIEL BUTTERFIELD ET AL.

Action upon promissory note for $250, written, We, D. B. as principal and J. E. B. as surety, jointly and severally promise, &c. Defence, want of consideration, shown by the following receipt: Received of D. B. a note signed by himself and J. E. B. of even date hereof, for $250, agreeable to the award of C., D. and E., made this day, which, when paid, will be in full of all demands up to this day, against said D. B., and signed by plaintiff.

It was in evidence that the said note and receipt were made after the termination of a reference by said D. B. and the plaintiff to said C., D. and E., of all demands which either of them had against the other, and the making up of the award by them mentioned in said receipt.

The defendants claimed that the receipt showed that the acceptance of the award was conditioned on the payment of the note by defendants, and that by the true construction of said receipt, they might refuse to accept the award and pay the note. The court declined so to rule. Exceptions overruled.

Rescript. "1. The receipt did not show that the award was not accepted by the defendant.

"2. Evidence that the arbitrators included in their award notes which were barred by the statute of limitations, was inadmissible."

HUGH MORRISON *v.* THOMAS MCDERMOTT AND TRUSTEE.

Rescript. "General Statutes, ch. 142, sec. 73, applies to questions relating to trustees' costs, in cases where a claimant of the funds in the hands of the trustees intervenes, only as between the claimant and the trustee, and as affecting the party by whom the trustee's costs are to be paid."

D. S. Richardson and *McEvoy* for plaintiff; *Sweetser* and *Gardner* for claimants.

JAMES PHILLIPS *v.* RICHARD SOULE, ADMINISTRATOR.

Judgment on the verdict for the plaintiff.

Rescript. "1. The judge who presided at the trial had the power to reserve any questions of law which arose at the trial of the case for the consideration of the full court; and such reservation might have been made by him in this case, at the time the motion for a new trial was heard and overruled. But

"2. The court are of opinion that it would be an unjustifiable exercise of this power for the judge to reserve any questions in this

case, because none were reserved in fact at the trial, and the judge is of opinion that his rulings were correct, and do not require the revision of the whole court."

Theo. H. Sweetser and *S. H. Folsom* for plaintiff; *Wm. Brigham* for defendant.

Inhabitants of Shirley *v.* Inhabitants of Lancaster.

Judgment for defendants.

Rescript. "The pauper being more than twenty-one years old, when her father acquired a settlement in Lancaster, her settlement did not follow his. By arriving at majority, she was legally emancipated, though continuing to reside in her father's family. Her father had no legal control of her nor right to her services. 4 Mass. 493; 13 Mass. 469; 15 Mass. *Upton* v. *Northbridge.*"

Tappan Wentworth for plaintiff; *John D. Washburn*, for defendants.

W. L. Johnson *v.* Charles Boardman et al.

Writ of entry, with averments of disseisin. Plea nul disseisin. The demandant at the trial put into the case a deed to him of said estate, dated 1855, and a deed of the collector to said tenant Boardman, sold for the non-payment of taxes, assessed in 1856 and dated in 1857, and there rested his case. Tenants asked for nonsuit.

Rescript. "1. The motion for nonsuit was rightly overruled, because the demandant had proved a *prima facie* case.

"2. The deed of the tax collector to Boardman did not estop the demandant from establishing an earlier title in himself."

S. Welles, jr., for demandant; *W. P. Harding* for tenants.

Simeon N. Frost *v.* Seth Gage.

An action to recover plaintiff's share of the proceeds of the estate of Richard Frost, plaintiff's father, assigned to defendant for the benefit of his creditors.

The defendant was one of the largest creditors. He contended that before the execution of the assignment of the estate and the release of the creditors, the plaintiff promised the defendant, that if he would assist the father to obtain a settlement with his creditors, he the plaintiff would make no claim upon the defendant for his the plaintiff's share of the estate, and would further give the defendant his note for the balance of defendant's debt. That upon

these promises he was induced to and did sign the release; that this was secret and unknown to the other creditors, and therefore fraudulent, and the plaintiff could not recover.

Rescript. "1. The burden of proof was on the defendant, to prove a secret and fraudulent agreement in order to defeat the right of the plaintiff to recover his share or proportion of the assigned estate in the hands of the defendant.

2. The mere proof that an agreement and release was made between the plaintiff and defendant by which it was stipulated that the latter should receive a greater proportion of his debt than was to be paid to the other creditors, raised no presumption of fraud. It was the duty of the defendant to establish that the agreement was in fraud of creditors, by evidence satisfactory to the jury; that it was secret and underhand."

A. F. L. Norris for plaintiff; *Wm. P. Webster* for defendant.

GEORGE W. MARTIN *v.* BENJAMIN F. SIMPSON.

This was an action of tort to recover damages caused by the fall of defendant's wall upon plaintiff's building.

The parties were occupants of two adjoining temporary wooden buildings, the eaves of the roofs of which met and the water from each flowed between them, or was carried off in a common gutter. Defendant tore down his building and commenced the erection of a stone and brick building. The eaves of plaintiff's building projected so as to touch one side of defendant's wall. During a severe rain defendant's wall fell, as plaintiff claimed, from its insufficiency and want of protection; but as defendant claimed, from the effect of the flow of water from plaintiff's roof against it.

The court ruled that if defendant's wall was negligently constructed, and if water from plaintiff's roof contributed to cause the fall of the wall, the defendant would still be liable, if he exposed his wall to this flow without reasonable precaution, while the wall was being constructed; that the right of the parties was to depend upon the condition of things existing at the time the building was begun. The defendant's principal authority was Viner's Abr. Nuisance, G. 5.

Verdict set aside and new trial ordered.

Rescript. "The instructions given to the court were insufficient, because they omitted to state the rule of law applicable to a case where the plaintiff's own negligent or unlawful act contributed to produce the injury, for which the plaintiff asked a compensation in damages. He had no right, by an artificial structure, erected on his own land, to cause the water to flow therefrom on to the land of the defendant, in such manner as to work any injury or to

weaken or impair the strength of any building or wall which was placed on the defendant's land. Such a flow of water on the premises of the defendant would be in the nature of a nuisance, and if it contributed to produce the fall of the defendant's wall, the plaintiff could not recover damages thereby occasioned to his building, although the defendant had constructed his wall negligently or unskilfully.

The instructions should have substantially embraced the following statement of the rule of law applicable to the facts in proof. 'If the plaintiff's roof was so constructed that the water which fell and accumulated thereon was projected over the line of the plaintiff's land, and thrown in and upon the estate of the defendant in such quantities or in such manner as to weaken, impair, or in any way injure the wall of the defendant by means whereof the injury complained of was in part occasioned, the plaintiff cannot recover in this action; but if, on the other hand, this state of facts was not proved to have existed, and the injury to the premises of the plaintiff was found to have been caused by the negligence or unskilfulness of the defendant or his servants or agents, in constructing his wall, without any act or omission of the plaintiff having contributed thereto, the plaintiff would be entitled to recover.'

"The rulings on the competency of the evidence were correct."

Sweetser & Gardner for plaintiff; *W. P. Webster* for defendant.

Supreme Court of Errors of the State of Connecticut.

New London County, March Term, 1861.

Present—STORRS C. J., HINMAN, ELLSWORTH, AND SANFORD, Js.

MOSES L. NOYES AND ANOTHER *v.* THE NEW HAVEN, NEW LONDON AND STONINGTON RAILROAD COMPANY.[1]

A partner has power to compromise and discharge a claim of the partnership against a third party.

And a payment to a partner is a good payment to the firm, although the other partner or partners had given notice to the debtor not to pay to such partner. The debtor has a right to pay his debt, and cannot be affected by the disagreement of the partners as to who shall receive the money. Any partner wishing to prevent such payment must seek the aid of a court of chancery.

Whether the power of a partner to bind the partnership by an *executory* contract, would not be affected by a notice from the other partners revoking his authority: *Quære.*

N. one of two partners to whom a large sum was due from a railroad company on an unsettled account, gave notice to the company not to make a settlement

[1] 30 Conn. 1. This volume is now in press and will soon be published.

unless both partners were present. *E.* the other partner, was seeking to obtain the money due for the purpose of applying it to his own private use and of defrauding *N.*; and the railroad company, knowing of this intention and for the purpose of aiding him in accomplishing it, as well as for the purpose of getting a more favorable settlement of the account, made a secret settlement with *E.* and paid him a sum agreed to by him as the balance due, and took a discharge of the partnership debt. *N.* had no knowledge of the settlement till *E.* had left the State with the money, when he gave immediate notice to the company that he should not recognize the settlement. In an action of assumpsit brought in the name of the partnership against the railroad company, to recover the amount of the account, it was held, that whatever remedy *N.* might have in any other form, yet that no action could be sustained in the name of the partnership to recover again the money so paid.

Assumpsit, brought by the plaintiffs, partners under the name of Noyes & Eddy, to recover an amount claimed to be due them under a contract for the construction of a portion of the road of the defendants. The defendants were defaulted and the case heard in damages before Park J.

On the hearing it was found by the court that the defendants, on the 31st day of December, 1857, were indebted to the plaintiffs on the contract in the sum of $18,808.38, and that of that amount the sum of $17,595.93 was on that day paid by the defendants to and received by the partner Eddy, on behalf of the plaintiffs, in full of the indebtedness.

The plaintiffs offered testimony to prove that Noyes had notified the defendants not to pay the balance due them to Eddy, and that the payment was made in disregard of the prohibition, and claimed that it was therefore not available to the defendants in their defence, but the court held that Eddy had a right as partner to receive payment of the money due the plaintiffs notwithstanding the dissent of Noyes.

The plaintiffs further insisted that the defendants were guilty of fraud upon Noyes in the means taken to accomplish a settlement with Eddy, and upon the evidence introduced by them in support of this claim the court found as follows: When the plaintiffs' copartnership was formed Eddy was in ill health, and had been so for a considerable period of time, and in consequence it was arranged between them that Eddy should engage a proper man to perform all the active duties of a partner in his stead, and should be relieved from the responsibility of attending personally to the work. Such a person was employed, and this arrangement was carried out during the continuance of the work. The partners entered into the contract with the company and commenced work under their contract in the latter part of the month of July, 1857, and continued their work until the month of December following. During all that time, all the transactions between the company and the copartnership were carried on through Noyes. The monthly estimates of work done on the contract were delivered to him and the

monthly payments were made to him. On two occasions the president of the company passed by Eddy, when at hand, and procuring a horse and carriage rode to Stonington, some twelve miles distant, for the purpose of paying the monthly estimates to Noyes. When the October estimate was paid in November, it was arranged between the defendants and the plaintiffs that the contract then subsisting between them should be given up, and the defendants agreed to pay for all the work performed according to the terms of the contract. The work substantially ceased on the 2d day of December, 1857, when the chief engineer with his assistants commenced making up the final estimates of work done. Noyes at this time was out of business, and was waiting at Stonington for the final estimate to be completed. It was completed on the 30th of December, and for some time before Noyes had made daily inquiries of some of the corps of engineers when it would be finished. He was told repeatedly, when making such inquiry, that the final estimate would be given to him when completed; and the chief engineer so informed him but a few days before its completion. Eddy during this time paid no attention whatever to the final estimate. He spent part of the time at New London, and part of the time in the city of New York. When the arrangement was made to give up the contract Noyes notified the president of the company that all parties in interest must be present when the settlement should take place; and afterwards, at Stonington, he requested the president not to make a settlement or pay any money on account of the partnership unless all parties in interest were present, and the president assented to this. Sometime previous to the settlement, the president of the company entered into a secret negotiation with Eddy to settle with him alone, in the absence of Noyes, and it ended in an agreement to do so. Thereupon the chief engineer was informed by the company of the fact, and was instructed to keep the matter secret from Noyes. The engineer obeyed his instructions, and Noyes was deceived in relation to the time when the final estimate would be completed, and knew nothing whatever of the contemplated settlement with Eddy until after it had taken place and Eddy had left the State. The final estimate was completed about twelve o'clock at night, on the 30th of December, and the chief engineer remained in his office at Stonington, where he resided, until it was finished. At that time it was arranged by the company to meet Eddy at New London the next day for the purpose of a settlement, and Eddy was telegraphed to at New York by the company to be there for the purpose. The parties met in New London according to the arrangement and a settlement took place, and the company paid Eddy the sum of $17,595.93 on account of the partnership, and received from him a full discharge of all the partnership claims. When the arrangement was made in November to give up the con-

tract, the firm had certain property along the line of the road which they negotiated a sale of to the company for the sum of $2,500. In the settlement Eddy agreed to take $1,700 for the property, on the representation of the chief engineer that it was not worth more than that sum. The final estimate presented at the settlement consisted merely in the gross amount of the work done and the sums of money that had been paid. Eddy knew but little concerning the matter, and it did not appear that he took any measures to inform himself, or had anything to say in the settlement in relation thereto. When the parties met at New London, the company being apprehensive that Noyes by some means should ascertain what was being done, and should come to New London before the settlement should be completed, directed two men to watch for him. One was stationed at the ferry across which Noyes must pass, should he come from Stonington where he then was, and where the company knew he was, with instructions that should he come immediate information should be given to them. The other was stationed on the steps of the City Hotel, while the transaction took place, for the like purpose and with similar instructions. After the settlement had taken place it was proposed by some of the parties concerned therein to spend the night at New London, but the fear was expressed by others lest Noyes might come, and so it was thought best for Eddy to leave that night for New York, which he accordingly did. A part of the amount paid by the company was in checks upon one of the banks in the city of New Haven, payable within a few days, which checks Eddy before leaving procured to be discounted in New London after the banks had been closed for the day. Of the amount received by Eddy, about $100 came indirectly into the hands of Noyes through a third person, and the balance Eddy, after paying $7,477.20 to creditors of the firm, appropriated to his own use. As soon as Noyes heard of the settlement he notified the company that he should not hold himself bound by the settlement, and charged them with fraud, and declared that he should call them to a legal account for the transaction. When he received the $100, he received it merely to apply on the account with the company, and did not intend to ratify, and did not ratify, the settlement made by Eddy with the company. The greater part of the $7,477.20 paid by Eddy had been attached in the hands of the company by process of foreign attachment, and the company required in the settlement that these debts should be paid, and the remainder of the sum was not paid by Eddy until after he was compelled to do so by sundry other creditors. A few days after the settlement Eddy remarked to a friend that when Noyes should become apprised of what had taken place there would be "a high old time." Habits of intemperance that had been formed by Eddy increased upon him after the settlement, and not long thereafter he became insane, and finally

died in a hospital in July following, during the pendency of the present suit.

On these facts and other evidence not detailed, the court was fully satisfied, and consequently found, that Eddy in the settlement intended to defraud Noyes; that he intended to get all the money due the firm from the company into his own hands to apply the same to his own individual use, and never intended to account for the same with Noyes; and that the transaction was carried on from the first with such purpose. The court also found that the company knew what was the purpose of Eddy from the commencement of the transaction to its close, and entered into the arrangement, and carried on their part of the transaction, partly under the expectation of a more favorable settlement with Eddy than with Noyes, and partly to assist Eddy in getting possession of all the money due the firm, that he might apply the same to his own individual use; and consequently, that the company was guilty of fraud on the plaintiff Noyes. The court also found that Eddy, at the time of the settlement, was comparatively destitute of attachable property, and that this fact was likewise known to the company.

The defendants claimed that the law was so upon the facts found, that even if the court should find the fraudulent intent imputed by the plaintiffs, the defendants were nevertheless entitled to the benefit of the application of the payment of $17,595.93, and that no judgment could be rendered against them for any greater amount than the balance of the sum found due at the time of the settlement, after deducting therefrom the sum of $17,595.93. But the court overruled the claim, and decided that the settlement with Eddy was null and void so far as Noyes was concerned, but good so far as Eddy was concerned, and that the defendants were only entitled to the credit of such sums as appeared to have been actually applied by Eddy to the payment of creditors of the firm; and thereupon, and without finding what was the actual state of the accounts between Eddy and Noyes, no evidence having been introduced on that subject, rendered judgment for the plaintiffs for the balance left after deducting the $7,477.20 applied by Eddy to the payment of creditors of the firm, and the $100 received by Noyes. The defendants thereupon moved for a new trial.

Baldwin and *Halsey*, with whom were *Lippitt*, *Park*, and *Pratt*, in support of the motion.

1. Eddy had a right as partner to receive payment of the money due the plaintiffs, notwithstanding the dissent of Noyes, there being nothing in the case to show that the power and authority of the partners was not equal in the matter. When two have a joint personal interest, the release of one binds the other. A release by one is a release by all. Each partner possesses the power to collect debts, receive payment and give a discharge. *Ruddock's case*, 6

Coke, 25; *Stead* v. *Salt*, 3 Bing. 101; *Pierson* v. *Hooker*, 3 Johns. 68; *Bruen* v. *Marquand*, 17 id. 58; *McBride* v. *Hagan*, 1 Wend. 326; *Wells* v. *Evans*, 20 id. 251; *Salmon* v. *Davis*, 4 Binney, 375; *Smith* v. *Stone*, 4 Gill & Johns. 310; Coll. on Part. § 468; Story on Part. § 115; and this even if insolvent; *Major* v. *Hawks*, 12 Ill. 298. This right does not rest merely on the ground of presumed agency, but upon the interest which each partner has in the whole effects, and upon the necessities of the case. Therefore, when the act is to receive payment and *discharge* a claim due the firm, one may act against the dissent of the other, though in contracts to *charge* the firm, the rule may be different. 1 Parsons on Cont. 151, and authorities *supra*.

2. As Eddy had full authority as partner to receive payment of money due the firm, judgment should have been rendered for the plaintiffs for the unpaid balance only; — because, 1st. In suits by partners, all must join as plaintiffs; Story on Part. §§ 234, 235, 236. 2d. Whatever is a good bar or defence as to one partner, is equally so as to all; Story on Part. ib.; *Austin* v. *Hall*, 13 Johns. 286; and to the same point the cases above cited. 3d. The equity of a defrauded partner cannot therefore be worked out in a court of law, where he must join his fraudulent partners with him as plaintiffs, for the payment, being good as to one of the plaintiffs, bars the joint action of both. Story on Part. §§ 236, 238; Coll. on Part. §§ 643, 455, note to § 493; *Homer* v. *Wood*, 11 Cush. 62; *Jones* v. *Yates*, 9 B. & C. 532; *Richmond* v. *Heapy*, 1 Stark, 202; *Wallace* v. *Kelsall*, 7 Mees. & Wels. 264; *Greeley* v. *Wyeth*, 10 N. Hamp. 15; *Gordon* v. *Ellis*, 7 Mann. & Grang. 607. The court held that the payment was binding upon Eddy, but not upon Noyes, and yet rendered judgment for Noyes and Eddy jointly to recover, as if no payment had been made. The plaintiffs have to allege and rely upon the fraud of one of them to defeat the application of the payment. The principle stated therefore applies. 4th. The remedy of a defrauded partner is by an action on the case or petition in chancery. *Homer* v. *Wood*, 11 Cush. 62; *Longman* v. *Pole*, Mood. & Malk. 223; Coll. on Part. § 455. To permit the plaintiffs to recover the money thus paid to one of them, leads to this absurd result—that the same parties receive double payment of the same debt. The remedies of the law are adapted to the purposes of justice in such manner as not to work gross injustice in the attainment of that object.

3. With regard to the motive of the defendants in settling with Eddy: — Nothing is found to show that, as between Eddy and Noyes, Eddy was not entitled to keep the money. But suppose there was, and the officers of the company paid the money with the fraudulent motive imputed, can a corporation have a fraudulent *motive* imputed to it in the performance of a *legal duty*, the payment

of a debt? Its officers may have been privy to the fraudulent motives of Eddy, and desired to aid him in defrauding his partner; but that was no part of the act of the company. The company were not chargeable with their motives, which were entirely collateral to the act done in its behalf. The company was not *benefited*. It could neither gain nor lose by the use Eddy made of the money. An agent in making a *contract* for a corporation, may involve them in the consequences of a fraud practised upon the other party; but an agent who *does an act* which it is the *duty* of his principal to do, and nothing more, cannot make the principal responsible for the motives, other than the *legal duty* of his principal, which may influence him in its performance.

C. Chapman and *E. Perkins*, with whom were *Palmer* and *Trumbull*, contra.

1. The only ground on which it can be claimed that a new trial should be granted, is that the payment of the $17,595 was a good and valid payment to the copartnership. If it was so, it would entirely bar, *pro tanto*, not only this action, but any action which might be instituted in the name of the firm or of either partner. The conclusive answer to every such action would be, that the debt for which the suit is brought has so far been paid. If, however, it was not a payment for the benefit of the copartnership, but a payment to Eddy for his individual use, and for the purpose of enabling him to defraud the partnership, which is a fact most explicitly found, then it was not, either in fact or in law, a payment to the partnership, and does not operate to extinguish so far the debt due to the partnership. It is absurd to call a payment, made expressly for the purpose of aiding in a fraud on a partnership, a payment to the partnership. Payment is always a question of intention. Here it is expressly found that Eddy did not receive this money for the benefit of the partnership, but with the intent to apply it to his own individual use in fraud of the partnership, and that the defendants paid it to him with full knowledge of this intent and for the purpose of aiding him in carrying it out. If Eddy had found this money in the street and had refused to give it up on demand, or the defendants had lent it to him and he had refused to repay it, the claim could not be set off against the claim of the partnership; and yet it would be as true as it is here, that by a recovery on the part of the partnership Eddy would be receiving the money twice over. The transaction in each of the cases supposed would not be more entirely that of Eddy as an individual, than the transaction in question, in which it is found that the money was paid and received wholly for Eddy's individual use.

It is said, however, that the authorities are decisive against an action at law in such a case in the name of the firm, and that the only remedy of Noyes is by a bill in equity against Eddy and the

defendants. And the case of *Jones* v. *Yates*, 9 Barn. & Cress. 532, is relied upon as a leading case upon this point. But that case is clearly distinguishable from the present, in the fact that the misconduct of the partner was itself the ground of the action, not, as here, the ground of defence. Lord Tenterden there says that there is great inconsistency in allowing a partner to recover on the ground of his own misconduct. We seek here to recover on the ground of our just claim against the defendants upon their contract. The misconduct of Eddy forms no part of our case. It comes into the case for the first time when the defendants attempt to set it up as a ground of defence. The supreme court of Pennsylvania, in *Purdy* v. *Powers*, 6 Penn. S. R. 492, say, "The fraudulent act of one partner does not affect the title of the partnership." The case of *Homer* v. *Wood*, 11 Cush. 62, cited on the other side, turned upon the point that the defendant was not implicated in the fraud of the partner. The court simply decide that, *in the absence of fraud known to the debtor*, either partner has the power to discharge a partnership debt. In the case of *Pierson* v. *Hooker*, 3 Johns. 68, there was no fraud in any of the parties. So in those of *Stead* v. *Salt*, 3 Bing. 101, *Bruen* v. *Marquand*, 17 Johns. 58, *McBride* v. *Hagan*, 1 Wend. 326, and *Salmon* v. *Davis*, 4 Binn. 375. In the cases of *Wallace* v. *Kelsall*, 7 Mees. and Wels. 264, and *Richmond* v. *Heapy*, 1 Stark. 202, there was not only no question of fraud, but that circumstance is specially alluded to as an important one in each case. In *Longman* v. *Pole*, 1 Mood. & Malk. 223, it was held that if a person colludes with one partner to defraud the others, a joint action at law can be maintained by the other partners against the person so colluding. In *Greeley* v. *Wyeth*, 10 N. Hamp. 18, Parker C. J. seems to recognize the effect of a fraud as we claim it. So in *Gordon* v. *Ellis*, 7 Mann. & Grang. 607, Tindall C. J. says, on page 621, "There is no allegation in the plea of any collusion between Gordon and the defendants." It will be found that, in all the cases cited on the other side, the element of fraud, so prominent in this case, was wanting, and that in many of them this absence of fraud was the turning point of the case. These authorities, therefore, have no application where the defendant has not acted in good faith, or where the fraud of the partner is not itself the ground of the action. Here our cause of action is wholly independent of the fraud, and is admitted to be a valid one unless defeated by the fraud of the defendants themselves. So far from this fraud constituting a bar to our action, the defendants themselves, upon the best settled principles, should not be allowed to avail themselves of it as a defence. It is a maxim of universal acceptation in the law, that no man shall take advantage of his own wrong; and the

defendants can be allowed to avail themselves of this defence only in violation of this important rule.

The authorities in support of our general position are numerous. *Leavitt* v. *Peck*, 3 Conn. 124. *Tanner* v. *Hall*, 1 Penn. S. R. 417. *Dobb* v. *Halsey*, 16 Johns. 34. *Gram.* v. *Cadwell*, 5 Cowen, 489. *Exeringhim* v. *Ensworth*, 7 Wend. 326. *Mercien* v. *Andrus*, 10 id. 461. *Burwell* v. *Springfield*, 15 Ala. 273. *Noble* v. *McClintock*, 2 Watts. & Serg. 152. *Minor* v. *Gaw*, 11 Smedes & Marsh. 322. *Skiafe* v. *Jackson*, 3 Barn. & Cress. 421. *Farrar* v. *Hutchinson*, 9 Adol. & El. 641. *Atlantic Bank* v. *Merchants Bank*, 9 Am. Law Reg. 241. 1 Am. Lead. Cases, 452. 1 Parsons on Cont. 154.

That a bill in equity is not the proper remedy, is manifest from the fact that a payment of the debt will be as good a defence in equity as at law. If the transaction was a fraudulent one, then no effect should be given to it, either in law or equity, for fraud vitiates a transaction equally in both, and if it was a valid one, it should be sustained in equity as well as at law. The only effect of a bill in equity would be to compel Eddy to account for the money. But a judgment against him or his representatives would be of no value. Besides, if this is the only remedy, then it becomes necessary in every such case that the partnership should be dissolved and the entire partnership account settled, as, without such settlement, it could not be ascertained what part of the amount belonged to the defrauded partner, and what should be the amount of the recovery against the debtor, if there could be any recovery against him.

Ellsworth J. We are all satisfied that the defendants are entitled to a new trial.

We can entertain no doubt with regard to the legal character and effect of the payment of the $17,595.93 by the defendants to Eddy, one of the partners, and one of the plaintiffs in this action. It must, in our judgment, put an end to the right of the plaintiffs to recover that sum again in this suit.

The superior court found, that this sum was paid to Eddy and received by him in *satisfaction of the debt now in suit*, though something less than the amount actually due; and the judge properly held that Eddy had a right to receive it for that purpose, and that the settlement was good and obligatory upon him, though upon what ground he could regard it as null and void as to Noyes it is not easy to perceive.

On these premises it would seem to be impossible that Eddy and Noyes can unite in suing for this sum already in the hands of the former; and this attempt to force a second payment will be seen to be entirely absurd if we suppose that Eddy had been the survivor in the action instead of Noyes, while the same rule would of course prevail in either case.

The difficulty of maintaining a joint action upon the facts found below is so apparent that the plaintiffs' counsel are compelled to assert, and they do assert, that the payment of the $17,595.93 was not in fact a payment upon the partnership debt at all, but a transaction entirely foreign to that debt; as perhaps a loan to Eddy, or a delivery of so much money to him for some unknown purpose. Such a view of the transaction we can by no means concur in. It is a palpable denial of the finding of the judge, which is that Eddy received the money to apply, and in fact did apply it, in payment and satisfaction of the debt. Not to insist, as perhaps might properly be done, that the entire debt of $18,808.38 was released by the compromise, (for one partner could do this,) we may at least say that the two partners can recover no more than the difference between that sum and the sum paid, and for that it is agreed by the defendants that the verdict may stand if the rest is remitted on the record.

Now let us inquire on what ground it is that the plaintiffs claim that the money received by Eddy was not a payment and satisfaction of the partnership debt when it had been agreed that it should be. It is to be observed that the state of the company account between Noyes and Eddy nowhere appears upon the papers. That fact seems to have been thought quite immaterial upon the trial of the cause, as indeed it would be in a suit by partners against a third person to recover an unpaid partnership debt. Hence we have no means of knowing that Eddy, by receiving the money, whether to apply on his own debt against the company, or to pay other creditors of the company, or to reimburse himself for his capital advanced, has done his partner any injustice whatever. Whatever may have been threatened, we do not see that any injustice has actually been perpetrated on Noyes, nor can we know it, until the account is settled between them, or the state of the account agreed upon.

But the counsel of Mr. Noyes claim it to be an important fact that their client notified the president of the railroad company to make no settlement unless both partners were present, and that the president agreed to this. The counsel are not entirely agreed whether this notice meant that the defendants should not settle with certain factorizing creditors without the contractors were present, or that one partner should not be paid unless the other was present and agreed to it. Be this as it may, it is not found that Eddy assented to the arrangement or in fact had notice of it, and he certainly had power as partner to settle with their debtor and receive payment. He was not affected by what Noyes had done, for, if so, then he could have stopped payment to Noyes, and the defendants could not then have paid their debt, or made a legal tender of it to either. This would be absurd. The defendants

had nothing to do with the plaintiffs' quarrels. A court of equity could, if necessary, in a bill with proper averments, have interposed; but the request of Noyes had no legal effect. Without more than appears in this case the defendants could pay either of the partners, for they constituted but one person. The circumstance that the president promised not to pay Eddy separately, if that be the construction of the request, amounts to nothing against Eddy. If the president has broken a legal promise to the injury of Noyes, the remedy is against him, but it is not enough to defeat the payment made to the partner Eddy.

It is urged further, that Eddy's purpose in affecting a settlement was to get the money into his own hands and not account for it, and that the defendants were cognizant of this, and yet settled with him, partly because they could settle with him more favorably than with both, and partly to enable him to put the money into his own pocket. But Eddy is accountable for it at all events as a partner, and we do not know but that every dollar of it was justly due to him, or to the partnership creditors who perhaps are urging their claims against him or his estate. We cannot see that a fraud has been accomplished to the injury of the partnership, or even of Mr. Noyes, although there has been a breach of the confidence which belongs properly to the partnership relation, and in ordinary cases is inseparable from it; and even if a fraud has been committed by the company on Noyes, it would not be a fraud on Eddy, or on the partnership as such, and no action could be maintained in the name of the partnership for it.

We have not thought it important to discuss the law of the cases cited on the argument. It seems to us to agree with the views which we have expressed as the result of our own reflections. We consider the rule to be this—that wherever one partner settles with a debtor of the company and receives payment of the debt, he cannot retain the money and repudiate the settlement; nor can he, either alone or in union with his partner, recover the debt a second time.

It may be proper, in view of some of the cases cited, that we remark that there is a wide difference between joint plaintiffs and joint defendants in cases involving the acts of one partner, such as settlements, and payments by or to him in the partnership business. In the first each plaintiff must have a perfect cause of action, as much so as if he had sued alone; in the latter each will stand on his own personal merits or individual defence.

Nor have we gone into the question whether the authority of a partner to bind his co-partner within the scope of the partnership, may not be revoked or restricted as to *executory* contracts, with notice to the party dealing with him to that effect. We are inclined to think that it may, and that it was so held in the case of

Leavitt v. *Peck*, 3 Conn. 124. But the payment of an existing debt to one of the partners, notwithstanding the request of the other that it should not be so paid, is a very different matter. Debtors have rights of their own, and they are not dependent upon the continuance of partnership authority for the discharge of their duties. Unless there has been an assignment with notice, or an injunction from chancery, they may treat each partner of the firm to which they are indebted as representing the whole company, however numerous.

We advise a new trial, unless the amount of the payment in question shall be remitted on the record.

In this opinion the other judges concurred.

RECENT ENGLISH CASES.

Mounsey *v.* Ismay.—Jan. 20, 1863.

To an action of trespass *quare clausum fregit*, the defendant pleaded that from time immemorial, on Ascension-day horse-races had been held, and of right ought to be held on land in a certain extra parochial place, and that there was a custom for the freemen of the town of C. to enter on the close for the purpose of horse-racing.

Held, on demurrer to the plea, that the custom was good and reasonable.

Trespass *quare clausum fregit*.

Pleas—1st. Not guilty. 2dly. That from time, whereof the memory of man runneth not to the contrary, on a certain day, to wit, on Holy Thursday, or Ascension-day, horse-races had been held, and of right ought to be held, on the close in question, being a certain extra-parochial hamlet of Kingsmoor, near to the city of Carlisle, &c., and that there was a custom for freemen of the city of Carlisle to enter in and upon the close in question for the purpose of horse-racing; and that the defendant was a freeman of the city of Carlisle, and so justified the trespass complained of. 3dly. A justification by the defendant as a citizen of Carlisle. 4thly. A plea alleging a custom for freemen to enter on the land in question at reasonable time before the races, &c.

Demurrer and joinder in demurrer.

S. Temple, Q. C. in support of the demurrer.—The question is whether the custom is reasonable. There is a case identical with this in Willes' Reports—*Bell* v. *Wardell*, Willes, 202. Now, this plea alleges a custom to go on the land in question for the purpose of horse-racing from the 6th to the 12th of May, just the time

when such a proceeding would be most injurious to crops. He cited a case of *Millichamp* v. *Johnson and Others*, in the notes to the case of *Bell* v. *Wardell; Abbott* v. *Weekly*, 1 Levinz, 176; *Fitch* v. *Rawling*, 2 H. Bl. C. B. 393; *Gateward's Case*, 6 Co. p. 59.

Mellish, Q. C. and *J. B. Maule*, in support of the plea, were not heard. *Cur. adv. vult.*

Pollock C. B.—In this case we took time to consider whether we would hear the arguments of counsel in support of the plea. We are of opinion that it will not be necessary. The action was for a trespass to land. The plea alleged a custom from time immemorial to hold horse-races on the land in question on or about Holy Thursday; and that there was a custom for freemen of Carlisle to enter on the land in question at that time for the purposes of horse-racing, and justified, etc. Now, we have to say whether such a custom is good; and that depends on whether it is a reasonable custom or not. Mr. Temple argued that such a custom was bad because it was unreasonable, and he cited a case of *Bell* v. *Wardwell*, in Willes' Reports, where a plea of a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year, was held bad; but it is expressly said that the custom was held bad because it appeared that the trespass was committed when corn was standing. So also the case of *Millichamp* v. *Johnson and Others*, reported in the notes to *Bell* v. *Wardell and Others*, a custom to enter on land for the purpose of playing any rural sports or games was held bad, as being too general and uncertain. But I think the custom here alleged is distinguishable from both the customs in those cases; because the plea alleges that the right to go on the land in question was limited to a few days about the time of Ascension-day, or Holy Thursday. I think such a custom is good, and that the defendant is entitled to the verdict. There were three other cases cited. In *Fitch* v. *Rawling and Others*, it was held that a custom for all the inhabitants of a parish to play at all kinds of games, sports, and pastimes in the plaintiff's close, at all seasonable times of the year, was a good custom, and there the custom is to enter on the close at all seasonable times. And in the case of *Abbott* v. *Weekly* a custom was held to be good, though not restrained to seasonable times.

Martin B.—I am of the same opinion, and I will just add that it is laid down in the second volume of Blackstone's Commentaries that a usage in a parish that all the inhabitants of the parish may dance in a certain close at all times, for their recreation, is a lawful usage, and the case in Levinz is there cited.

Judgment for the defendant.

BRAMPTON *v.* BEDDOES.—Jan. 16, 1863.

An agreement not to carry on a particular business for the sale of particular goods, within a certain district, does not mean that the business should be carried on in a shop or place of business within that district; the sale of similar goods within the area of the prohibition is a breach of the agreement, although not sold in a shop.

This was an action for breach of an agreement, not to carry on, or assist in carrying on a general drapery and hosiery business, within a certain district.

The cause was tried before WILLES J. The defendant had come within the district, and was collecting some old debts, when he received orders for goods of the same description as were sold in the above-mentioned business, which goods he supplied in pursuance of the orders. The defendant, however, had no shop or place in the district for the purpose of carrying on the business. A verdict was found for the plaintiff, leave being reserved to move to set it aside, and enter a verdict for the defendant or for a nonsuit. A rule having been obtained,

Joyce showed cause: *Turner* v. *Evans*, 2 E. &. B. 512.

Hawkins (*Rigby* with him), in support of the rule.

ERLE C. J.—I think this rule ought to be discharged. I think there was a breach of the agreement, and a very plain breach. I am quite certain that a man need not have a permanent shop to make a breach of this agreement. The purpose of the plaintiff was to get the customers the defendant had. He (the defendant) supplied those customers with goods, and so prevented the plaintiff, so far, from getting their custom.

WILLIAMS J.—I am quite of the same opinion.

WILLES J.—I think "the same business" does not mean in respect of being carried on in a shop, but the sale of similar goods to persons within the area of the prohibition.

KEATING J. concurred.

Rule discharged.

A DIGEST

Of Cases Decided in the English Courts of Equity, from Michaelmas Term, 1861, *to the Sittings after Trinity Term*, 1862, *both inclusive, as Reported in* Vol. X. *of* The Weekly Reporter, 1861–62, *or in other Legal Reports during the same period, together also with certain Cases Reported during the same period, but Decided previously thereto.*

NEWSPAPER.

Mortgagee—Receiver.—Circumstances under which the Court appointed a mortgagee of a newspaper to act as receiver and manager of the paper, until the hearing of the cause, upon an undertaking by him, to print, publish, and edit in the meantime. *Chaplin* v. *Young*, L.C.; 6 L. T. N. S. 97.

PARENT AND CHILD.

1. *Mortgage — Advancement — Presumption.*—A mortgage taken by a father in the name of his son must prima facie be presumed to have been intended as an absolute advancement or gift to the son, unless the evidence of what took place at the time of the transaction shows a contrary intention.

Circumstances under which this presumption of advancement was rebutted by the evidence. *Dumper* v. *Dumper*, V.C.S.; 6 L. T. N. S. 315; 8 Jur. N. S. 503.

2. *Religious education— Guardian.*—Unless a child has been allowed, either permissively or through negligence, to grow up in a faith different to that of his father, and very great danger to his moral and religious welfare would arise by effacing the strong religious convictions entertained by the child, the court will not interfere with the express directions contained in the father's will. *Davis* v. *Davis*, V.C.W. 245.

3. *Religious education—Guardian.*—Where a father has acted in such a manner as altogether to abdicate during his lifetime the duty of controlling the religious education of his children, and has entrusted it to his wife, a person of a different religion, and appointed her testamentatory guardian, the court will not treat as imperative the directions of the father's will that the children must be brought up in his own faith. *Hill* v. *Hill*, V.C.W. 400; 6 L. T. N. S. 99; 8 Jur. N. S. 609.

PARK.

Deer. — Deer in a park which have been reclaimed and domesticated become personal chattels and no longer part of the inheritance, so that a receiver on the life estate is entitled to let the land without maintaining the herd. *Ford* v. *Tynte*, V.C.W.; 2 J. & H. 150; 31 L. J. Ch. 177.

PARTNERS—PARTNERSHIP.

1. Where one partner lays out the partnership money in the purchase for himself of a chattel the firm does not thereby acquire a right to the chattel or a lien on the proceeds, as partnership property. *Wallon* v. *Butler*, M.R.; 29 Beav. 428.

2. *Administration of assets — Insolvency of both deceased and surviving partner—Separate and joint creditors—Priority—Charge of debts—Interest.*—Where in the administration of the separate assets of a deceased partner, it appears that both his estate and the estate of his surviving partner are insolvent, the separate creditors of the deceased partner have a priority over the joint creditors.

The fact that the deceased partner has by his will devised his estates, subject to the payment of all his debts in respect of the partnership concern or otherwise, is not sufficient to place the two classes of creditors on an equal footing.

Interest upon those separate debts which of themselves carry interest, constitutes a portion of the debts due, and

must, with the principal moneys, be paid in priority to the joint debts. *Whittingstall* v. *Grover*, M.R. 53; 5 L. T. N. S. 388.

3. *Articles of partnership – Construction.* — A partnership had been carried on between A. and B. without any agreement, but in equal shares. In 1860 a deed was executed providing that A. should thenceforward receive an annuity of £160 during his life, as his share of the partnership profits; and that B. should have the rest of the profits, and bear the losses. A. to retire at any time on two days' notice, and in case of his so retiring a deed of dissolution, including all usual and proper provisions, was to be executed. In case A. died before withdrawing, then his death to operate as a withdrawal of his name from the firm, and cause a cesser of the partnership. In case of B.'s death during A.'s lifetime one-half of the stock-in-trade and other property to be considered as belonging to B.'s estate. The deed, however, contained no provision for the disposition of the stock-in-trade, &c., in case of A.'s death in B.'s lifetime. A. died in B.'s lifetime.

Held, upon the construction of the deed, that A.'s representative was entitled to a moiety of the partnership property, and the apportioned part of the annuity of £160. *Nelson* v. *Bealby*, M.R.; 5 L. T. N. S. 559; L.C.; 5 L. T. N. S. 736; 8 Jur. N. S. 397.

4. *Articles of partnership—Continuation of business after expiration of term —Account of profits.*—When a partnership business for a term is carried on after the expiration of the term, although either party may put an end to the relation in the manner prescribed by the articles, yet if nothing is done to mark a dissolution and to render it effectual, and the business is carried on without variation, the law infers an agreement that the relation shall continue on the footing of the antecedent contract.

A. and B. were partners for a term of seven years under articles which provided that the business should be carried on in the name of B., who should reside on the business and act as managing partner, and that at the expiration of the term the assets should be realized, sold, and divided. After the seven years had expired the business was carried on by B. as before, the capital of A. still remaining in it. B. having claimed the whole profits since the expiration of the term, A. filed his bill for a dissolution, and the usual accounts upon the footing of the partnership articles.

Held, that as B. had continued the business after the expiration of the term, and as neither party had done any act which implied any disclaimer of the tacit agreement imputed by the law from the conduct of the parties that the partnership should continue, the plaintiff was entitled to an account, and to his share of the profits upon the footing of the partnership articles from the expiration of the term to the time when the business was sold. *Parsons* v. *Hayward*, L.C. 654; 6 L. T. N. S. 628; M.R. 531; 8 Jur. N. S. 474; 6 L. T. N. S. 523.

5. *Dissolution.*—Partnership dissolved by the court where misunderstandings and ill-feeling between the two partners rendered it impossible for the business to be conducted successfully, and to the mutual advantage of both partners. *Watney* v. *Wells*, M.R.; 30 Beav. 56.

6. *Dissolution—Injunction—Account.* —J. and M. agreed to dissolve partnership, and, until sale of the stock-in-trade, good-will, &c., to have the business carried on by receivers under their joint control. Before a sale had been effected, M. proceeded with the business, dealt with the partnership stock, and corresponded with the partnership customers. The court granted an injunction to restrain M. from so doing, and ordered that he should account for profits made since the dissolution. *Turner* v. *Major*, V.C.S. 243; 5 L. T. N. S. 600; 3 Giff. 442.

7. *Dissolution—Allowance for expenditure — Lease.* — Where a lease is acquired by one of the partners before the partnership, and it contains other property besides that which is afterwards included in the partnership, the lease, in the absence of express agreement, does not become part of the partnership property.

One of two partners having exercised his right to dissolve the partnership, an allowance was made to the other partner in respect of money expended on the joint property. *Burdon* v. *Barkus*, V.C.S.; 8 Jur. N. S. 130; 5 L. T. N. S. 573; 3 Giff. 412; L.C.; 8 Jur. N. S. 656.

8. *Dissolution — Lunatic partner — Mine — Sale.* — Three persons mutually agreed to carry on and work together certain mineral property; the deed of partnership providing that each party should be at liberty to sell his share after giving notice to the others, who were to have a right of pre-emption. One of the partners became a lunatic, and committees of his estate were appointed. On a bill filed by the plaintiff (who had purchased the shares of the other two partners) against the committees of the lunatic, praying a dissolution of the partnership and the usual accounts,

Held, that the partnership must be dissolved, and the property offered for sale as a going concern by some person to be appointed other than the parties.

The court will not compel a person to carry on a partnership with the committees of a lunatic, or to have the share of a lunatic partner ascertained by an inquiry what a stranger would give for it.

Notice to the lunatic partner before his lunacy of the intention of another partner to sell his share,

Held, to bind the committees afterwards appointed, and that they had no right of pre-emption under the deed. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, M.R. 186; 8. Jur. N. S. 88; 5 L. T. N. S. 658.

9. *Dissolution—Practice—Costs.*—In a suit for dissolution of partnership, which became necessary in consequence of the non-fulfilment by one of the partners of a covenant entered into by him, in the partnership articles, that he would diligently carry on and manage the business, the court refused to order such partner to pay the costs of the suit, but adhered to the ordinary rule in such suits, according to which the court does not deal with the costs up to the hearing. *Hawkins* v. *Parsons*, M.R. 377; 8 Jur. N. S. 452.

10. *Dissolution—Return of premium.* — Circumstances under which, upon a dissolution of a partnership between two solicitors, a part of the premium paid by the incoming partner who had voluntarily dissolved the partnership was ordered to be returned to him. *Bullock* v. *Crockett*, V.C.S.; 5 L. T. N. S. 822; 8 Jur. N. S. 502; 3 Giff. N. S. 507.

11. *Dissolution before expiration of time—Return of proportion of premium —Ground of dissolution.*—Where a partnership was dissolved before the expiration of the term fixed by the articles, upon the ground of mutual incompatibility of temper on the part of the partners (the court considering both partners to have been in the wrong), and one of the partners had paid a premium on entering the partnership,

Held, that he was entitled to a return of a part of the premium, the proportion to be calculated with reference to the number of years of the term which were unexpired.

Partnership for ten years. Premium paid, £1000. At dissolution, two years were unexpired. Return of £200 of the premium allowed. *Pease* v. *Hewitt*, M.R. 535.

12. *Goodwill — Suit by legatee of a share of goodwill.*—One of two partners died, having bequeathed his share in the goodwill (but not the book debts and stock-in-trade) to the plaintiff. The executor assented to the legacy. The plaintiff filed a bill against the surviving partner, praying that the goodwill might be sold and the plaintiff's share paid to him.

Held, that the bill could not be restrained, and a demurrer was allowed, and leave to amend refused. *Robertson* v. *Quiddington*, M.R.; 28 Beav. 529.

13. *Receiver.* — Notice was given for determining a partnership, but the validity of the notice was disputed by one of the partners, who filed a bill for an account and a receiver.

Held, in the absence of any evidence, that the partner giving the notice was unfit to conduct the management of the business. The court would not until the hearing of the cause remove him from the management and appoint a receiver. *Bowker* v *Henry*, V.C.W; 6 L. T. N. S. 43

14. *Withdrawing partner — Lease — Valuation — Bankruptcy—Forfeiture.*— A clause in a deed for carrying on a mine in partnership contained a provision that in the event of the bankruptcy or insolvency of any of the partners, an account should be taken and a valuation made of his share and interest in the mine, except the value of the lease, which was not to be taken into account, and the amount paid to the parties entitled.

Held, that, notwithstanding this clause,

the assignees of a bankrupt partner were entitled to his share in the lease. *Whitmore* v. *Mason*, V.C.W. 168; 5 L. T. N. S. 631; 2 Joh. & Hem. 204.

PATENT.

1. *Costs — Objections.* — Objections were filed to the sealing of letters patent, but afterwards withdrawn.

The order made for sealing the patent directed the costs of the objections and of the petition for sealing to be paid by the respondent who had filed the objections. *Re Cobley's Patent*, L.C.; 5 L. T. N. T. 387; 8 Jur. N. S. 106; 31 L. J. Ch. 333.

2. *First inventor—Publication—Foreign book—Exposure for sale in England.*—A publication of a new discovery, within the meaning of the patent law, takes place when the inventor of it, either by himself or his agents, having written a description of it in a book and sent it to a bookseller, such book is offered or exposed for the purposes of sale; and a person who afterwards takes out a patent for it is not the true and first inventor, although when he took out his patent he was ignorant of the existence of the work.

It is immaterial whether the invention be described in a foreign work, published abroad, if it is sent over to a bookseller in England, and is offered by him for sale.

The greater or less number of copies sold or circulated is unimportant on the question of publication. *Lang* v. *Gisbourne*, M R. 638.

3. *Specification.*—For the purpose of avoiding a patent on the ground of want of novelty there must have been such antecedent knowledge as will enable the public to perceive the discovery, and carry the invention into practical use.

Cases under which the validity of a patent for purifying gas was upheld. *Hills* v. *Evans*, L.C.; 6 L. T. N. S. 90; 8 Jur. N. S. 525.

PLEADING.

1. *Alternative relief — Bill on behalf of plaintiff and all the shareholders of a company.*—If a plaintiff sues on behalf of himself and all other shareholders of a company he must confine his prayer to such relief as is really for the benefit of the body of the shareholders, and cannot bring in the alternative relief, which is a benefit to himself but an injury to the other shareholders.—*Thomas* v. *Hobler*, L.C.; 8 Jur. N. S. 125; 5 L. T. N. S. 564.

2. *Answer — Insufficiency.* — The bill charged a deceased trustee with a breach of trust, and prayed an account of the estate of the original testator and of his own estate, as against his personal representative, together with consequential relief. The answer stated a settlement of the trust account, and a subsequent release, and declined to set out an account of the trustee's estate.

Held, on exceptions to answer, that the defendant was bound to answer fully, and that the plaintiffs were entitled to information as to the trustee's estate to enable them to know whether or not, in the event of establishing their case, assets would be forthcoming to meet their claims. *Brooks* v. *Boucher*, V.C.W. 708; 8 Jur. N. S. 639.

3. *Answer — Insufficiency.* —A defendant submitted by his answer that he was not bound to answer a portion of the interrogatories, which were not only unsupported by any corresponding statement in the bill, but were identical with interrogatories filed in an action at law, to his answer to which, recently put in, defendant craved leave to refer. To an interrogatory as to documents, he stated his readiness to make full discovery upon summons taken out at chambers.

Held, that the answer was insufficient in these particulars, and exceptions allowed with costs. *Hudson* v. *Grenfell*, V.C.S.; 5 L. T. N. S. 417; 3 Giff. 388.

4. *Answer — Insufficiency* — In a suit for dissolution of a partnership interrogatories were filed, asking defendants what were the duties undertaken by them in relation to the partnership and speculation; and what were the powers and authorities given to them in respect thereof; and by what documents they made out that they were invested with the powers and authorities they claimed to have.

Defendants answered that the powers and authorities given to them in reference to the partnership speculation appeared from the written communication from them to be made by the parties (in a foreign language) to which they referred.

Held, that the answer was insufficient, and that the defendants must specify the letters upon which they relied as showing their authority. *Inglessi* v. *Spartali*, M.R.; 29 Beav. 564.

5. *Demurrer coupled with plea*—*37th Order of 26th August*, 1841 (*Consolidated Order xiv., rule* 9).—A defendant who has put in a general demurrer to the whole bill cannot accompany his demurrer by a plea to the whole bill. *Lowndes* v. *The Garnett and Moseley Gold Mining Company*, V.C.W. 244; 5 L. T. N. S. 710.

6. *Demurrer — Multifariousness.* — Circumstances under which a bill praying the discharge of existing and the appointment of new trustees, and relief in respect of copyhold property, together with a sale and partition of freehold property unconnected with the former portion of the suit, was held multifarious, and a demurrer upon that ground allowed. *Crow* v. *Cross*, 3 L. T. N. S. 249; 7 Jur. N. S. 1298.

7. *Demurrer — Injunction* — Res judicata.—A bill filed to restrain an action at law on the ground that the matters in question had already been adjudicated on in equity.

Held, bad on demurrer, as it appeared that the previous adjudication in equity had proceeded not on the validity of the legal title, but on the absence of any equity to countervail it. *Waine* v. *Crocker*, L.J. 204; 5 L. T. N. S. 702; 31 L. J. Ch. 285.

8. *Interpleader—Suit in nature of interpleader suit — Charge on estate.* — A bill by the owner of an estate, which was subject to a charge in a suit, in the nature of an interpleader suit against the conflicting claimants to the money raiseable under the charge, sustained. *Vyvyan* v. *Vyvyan*, L.C. 179; 31 L. J. Ch. 158; 5 L. T. N. S. 511; 8 Jur. N. S. 3.

Notices of New Books.

A TREATISE ON THE LAW OF BANKRUPTCY AND INSOLVENCY. By FRANCIS HILLIARD. Philadelphia: J. B. Lippincott & Co. 1863. 8vo. pp. 476.

Mr. Hilliard has laid the profession under a new obligation, by the work which he has just given to the public. The subject is one of great and growing importance, and it has been the design of the author to give the treatise he has produced, a practical form and application for which the profession will feel they are greatly his debtors.

He has, in the first place, treated of the two subjects together, as forming one system, and in so doing has conformed to what had become a practical fact for most purposes, although, theoretically, the original distinction between Bankrupt and Insolvent laws, was wide and well defined.

There is still a distinction of a practical character which he has illustrated in his work, between a bankrupt law which Congress is authorized to pass, under the provisions of the Constitution, and extends over the whole United States, and the insolvent laws, which States are now held competent to pass, but which are limited to the several States by which they are enacted.

But whoever will take the trouble to trace the history and effect of the Bankrupt and Insolvent laws of England, or this country, will recognize the propriety of treating of them both under the same head, making, as the author seems to have done, proper and intelligible

discriminations as to the effect and extent of the one or the other in their different applications. Thus we find in the division of his subject, he treats of the nature of Bankruptcy and Insolvency, of acts of bankruptcy and insolvency, who may be bankrupts and insolvents, forms of proceeding in bankruptcy and insolvency, their property, their debts, proof of claims against them, and their discharge; and in his appendix has embodied the Bankrupt Laws of the United States of 1800 and 1841, and the Insolvent Laws of Massachusetts. And in this way, we have a homogeneous work which must be of practical utility to the profession.

It is not proposed to attempt a review of this work. It is enough that we name the subject and the author. And yet there is so much that is suggestive in the fact, that the subjects of bankruptcy and insolvency should, with propriety, be treated of, not only in the same volume, but in the same chapters and under the same subdivisions, as one and the same subject, that we are irresistibly led to glance at some of the changes through which the laws on these subjects have passed.

The first English Bankrupt Act was passed in 1543–4, and by it the debtor was regarded as a criminal, and his estate was seized and disposed of for the benefit of his creditors. The next was that of 13th Elizabeth, and was limited to such persons only as had used the trade of merchandise, and this idea has been retained in all the subsequent English Bankrupt acts. As there were large classes of debtors whom it was thought desirable to reach who were not traders, a distinct system of laws was adopted to meet their case, called Insolvent Laws, which were distinguished from Bankrupt laws in several respects. They extended in the first place to all classes of debtors. In the next place they could be taken advantage of by these debtors upon their own application, whereas proceedings in bankruptcy were always *in invitum*, so far as the debtor was concerned, and were instituted upon the complaint of one or more of his creditors. And, as originally understood, while a discharge in insolvency liberated the person of the debtor, but left his future acquisitions subject to his debts, a discharge in bankruptcy operated upon the contract or debt itself. In consequence of this, two systems have been in operation in England ever since the time of Charles II., during which time some forty or more insolvent laws have been passed there, and about a quarter as many bankrupt laws. Even there, however, by the late acts of 5 & 6 and 7 & 8 of Victoria, the distinction formerly so well defined between the systems, has been in a great measure done away with.

When our Constitution was formed, the power of establishing uniform laws upon the subject of bankruptcy was therein delegated as one of the powers of Congress.

The Colonies, we are told by Mr. Dane, had in some cases undertaken to pass insolvent laws, but none of them had enacted a proper bankrupt law.

This was one of the grounds upon which it was afterwards held that States might pass insolvent laws. But this power was limited by that clause of the Constitution which prohibited States from passing acts impairing the obligation of contracts. Applying these three principles, the result, in the end, was this. The power of Congress under the Constitution being paramount to the reserved powers of the several States, any general bankrupt act passed by that body necessarily operated as a suspension of the power of the States to make laws upon the same subject matter, which should conflict with those of the Federal Government. But until Congress had

acted by the passage of such general law, the respective States were at liberty to pass insolvent laws. These however were restricted within these limits: first they could not impair any existing contracts made before the enactment of such a law, and second, being merely State laws, they were local in their character and not binding upon the citizens of other States, unless they should have voluntarily contracted in reference to the existence of such a law.

There was therefore a most marked distinction between a bankrupt law and an insolvent law, even if their terms were the same, in this, that while the one extended throughout the Union, and a discharge under it was valid in every State and court, the other was confined to the State that enacted it; and, with certain limitations and exceptions, a discharge granted under its provisions was of no validity in the courts of other States, whose citizens might there avail themselves of a legal remedy for the recovery of their debts. The law is stated here in general terms, and it is not intended to define in what cases citizens of States, other than that by which such insolvent law is enacted, will be bound by proceedings under it affecting debts due to them.

The first Bankrupt law passed by Congress was in 1800. By its terms it was to continue for five years, but it was repealed at the end of two years and eight months; and the power lay dormant until August, 1841, when the second Bankrupt law was enacted.

The passage of this act was vehemently opposed by many of the prominent men in Congress, and among them by Mr. Benton, who insisted that it was not such a law as the Constitution contemplated, but a mere insolvent law; that a bankrupt law was designed for the benefit of the creditor quite as much as of the debtor, and was intended to be, as to the debtor, a proceeding *in invitum*; whereas, the bill thus proposed, opened the door for all debtors to take advantage of it at their election. It was passed, however, and the event showed how accurate the opponents of it were in their estimate of its purposes and effect. It was repealed in March, 1843. During that time, in the State of Masachusetts alone, there were 3,349 applicants for relief under it, whose creditors numbered 99,619, and the amount of their debts exceeded 34,000,000 of dollars, while only forty debtors were proceeded against *in invitum* by their creditors during that period.

If time and space admitted of our analyzing the provisions of that act, it would not be difficult to show that it partook far more of a modern insolvent law than the ancient rigorous acts of the English Parliament, for the enforcement of the rights of creditors by proceedings against a bankrupt debtor.

The so-called insolvent law, to which this act of 1841 was most nearly assimilated, was that of Massachusetts, which, as already stated, Mr. Hilliard has inserted in his work.

The history of this law may be familiar to many of our readers, and yet not be without its interest to others. The memory of some of the more advanced practitioners, goes back to the time when imprisonment for debt was a remedy to which every creditor might resort. It was first curtailed by limiting the amount for which a debtor was liable to have his body taken upon execution. In 1811 this was fixed at *five* dollars, but for any sum exceeding that he was liable to imprisonment. That measure was the commencement of a state of sentiment adverse to such coercive remedies, till, at last, imprisonment for debt has practically ceased to be a means of compelling its payment.

With this there grew up a sentiment, especially in our larger cities, and among

the men most extensively engaged in business, favorable to granting indulgence to debtors, either by extending the time of the payment of their debts, or by accepting a composition of the same, which operated, to a considerable extent, like an insolvent law, except that whatever was done by the creditor was an act of favor and indulgence. And in accordance with this growing sentiment, the custom of making assignments of their assets by debtors to trustees, to be disposed of and distributed among their creditors, became very common. But the verse quoted by Coke in his report of Twyne's case, ending with "*crescit in orbe dolus,*" has been found to be as true in our own day as in the forty-fourth year of Elizabeth, and the lawyer of thirty years ago hardly need be reminded of the schemes by which creditors were defrauded, unfair preferences secured, and the law of debtor and creditor evaded, by means of assignments wherein the debtor chose his own assignee, and dictated his own terms of adjustment and release of his debts. Add to this the growing custom of executing mortgages of personal property to secure real or fictitious debts, the validity of which, unless accompanied by actual delivery of the thing mortgaged, was not fully established till within forty years.

In this state of things, growing out of a prevailing sentiment against imprisonment for debt, and a wish on the part of many that some measure might be adopted whereby the honest debtor might be discharged from his debts, and unlawful and unfair preferences in favor of particular creditors, real or fictitious, prevented, the project of an insolvent law was suggested, and in 1831 a commission was appointed by Gov. Lincoln, consisting of Hon. Charles Jackson, Hon. Samuel Hubbard, and John B. Davis, Esq., for considering the subject, and reporting a bill to accomplish the desired purpose. Of the character of these gentlemen it is unnecessary to speak at length. Mr. Davis died too early to have achieved the full reputation for talent, industry and sound judgment of which he had given an earnest in what he had already accomplished. Of Judges Jackson and Hubbard it is only necessary to say, that they were among the strongest of the strong men who have sustained the high character of the Supreme Court of Massachusetts. They prepared and submitted a very able report upon the subject, accompanying a bill, in May, 1831. The public however do not seem to have been ready for so great a change as this bill proposed in the law of debtor and creditor, and the report and bill were suffered to lie without being acted upon by the legislature.

In 1836 there was an attempt to regulate the then familiar custom of voluntary assignments by insolvent debtors, by the machinery of oaths and restrictions, as to parties to these assignments and discharges of debtors, and an act to that effect was passed that year. But it was found to be an inconvenient and ineffectual mode of obviating an acknowledged evil. And at the session of the legislature in 1838, in a debate growing out of some proposed change in the law of mortgages of personal property, wherein the inadequacy of the then existing laws to guard against fraud was exposed, a member from the country, who from a pretty long legal experience had become satisfied that, mischievous as an insolvent law might be, it presented far less opportunities for fraud, if properly guarded, than the existing mode of dealing with debtors, suggested that the bill reported by the commission in 1831, was entitled to the consideration of the legislature as a means of attaining the object they had in view. A motion to refer this report to a committee was accordingly made and carried, and the re-

sult was that the act of 1838, based upon the report and bill of 1831, became a law.

This law, it is believed, became afterwards in its provisions the basis upon which the Bankrupt Act of 1841 was modelled. The subject therefore of Bankruptcy and Insolvency has become, from the similarity of legislation upon the two subjects, both in England and this country, properly blended in a single treatise. And in supplying this for the profession, Mr. Hilliard has done a good work, which they will not be slow to acknowledge. E. W.

A TREATISE ON THE LAW OF MERCHANT SHIPPING. By DAVID MACLACHLAN, M. A. London: William Maxwell. 1860. Royal 8vo. pp. 867.

This is one of the very best of the recent issues of the English press. It is "an acquisition to legal literature," says Mr. Justice WILLIAMS. It is "an excellent, able and well written work," says Lord Chief Justice COCKBURN. It is worthy of the careful study of every member of the profession who is engaged in the practice of this branch of the law. It is the best treatise on the subject extant.

THE BIBLIOGRAPHER'S MANUAL OF ENGLISH LITERATURE. By WILLIAM THOMAS LOWNDES. New Edition, Revised, Corrected, and Enlarged. By HENRY G. BOHN. Part VIII. London: Henry G. Bohn. 1863. Post 8vo.

We have carefully examined the different Parts of this improved edition of this well-known manual of bibliography, as they have from time to time been published. As a manual of general literature it is one of the best. As a manual of legal bibliography it does not profess to be complete; and the brief statements of the utility and estimation in which law books are held by the profession, are often inaccurate. The article on Shakespeare in this Part, alone is well worth the price of the whole book. But we notice on p. 2269 *b*, this singularly false statement in regard to Mr. White's edition: "This edition includes 117 Emendations from J. P. Collier's corrected folio of 1632."

CROWN CASES RESERVED FOR CONSIDERATION, AND DECIDED BY THE JUDGES OF ENGLAND. Easter to Michaelmas, 1862. By the Hon. E. CHANDOS LEIGH, and LEWIS W. CAVE, Esq. London: V. & R. Stevens, Sons & Haynes; Sweet; and Maxwell. 1863. Vol. 1. Part III. Royal 8vo.

This Part of these truly valuable Reports includes all the cases, twenty-one in number, that have been decided from the beginning of Easter Term to the end of Michaelmas Term, 1862.

The prisoner was indicted for obtaining money by false pretences, the false pretences being, that he was an unmarried man, that he would marry the prosecutrix, and that with the money she was to give him, he would furnish a house for them to live in. ERLE C. J.: "It is clear that a false promise cannot be the subject of an indictment for obtaining money by false pretences. Here, however, we have the pretence that he was an unmarried man. This was false in fact, and was essential, for without it he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises, neither of which alone would have supported the conviction." *Regina* v. *Jennison*, p. 157. The same point was similarly decided in *Regina* v. *Fry*, Dearsly & Bell, 449, and *Regina* v. *West*, Dearsly & Bell, 575.

In *Regina* v. *Smith*, p. 168, the prisoner was indicted for forging and uttering a false entry in what purported to be a banker's pass-book with intent to defraud. It was held, on the authority of *The King* v. *Harrison*, 1 Leach, C. C. 180, 4th ed. that this is an indictable forgery.

The prisoner was tried upon an indictment which contained two counts, one for embezzlement, and the other for larceny as a bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and the court thereupon directed the counsel for the Crown to elect upon which count he would proceed, the counsel for the prisoner contending that such a course was inadmissible. The counsel for the Crown elected to proceed upon the second count, and on that count the prisoner was convicted. Held, that the conviction was right. *Regina* v. *Holman*, p. 177.

Where a jury return what the judge considers to be an improper verdict, he may direct them to reconsider it, and is not bound to record it unless they insist upon his doing so. And where the jury reconsider their verdict and alter it, the second is the real verdict of the jury. POLLOCK C. B.: "A judge has a right, and in some cases it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury." *Regina* v. *Meany*, p. 213.

Upon the trial of an indictment under the 24 & 25 Vict. c. 100, § 59, for supplying a certain noxious thing knowing that the same is intended to be used with intent to procure miscarriage, it is necessary to prove that the thing supplied is noxious. The supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against that statute. POLLOCK C. B.: "A mere guilty intention is not sufficient to constitute a crime. There must be an intent coupled with an overt act tending to the perpetration of the crime. The administration of pure water is no offence within the section under which the woman was indicted." *Regina* v. *Isaacs*, p. 220.

The prosecutor found a cheque, and being unable to read, showed it to the prisoner. The prisoner told him that it was only an old cheque of the Royal British Bank, and kept it. He afterwards made excuses for not giving it up to the prosecutor, withholding it from him in the hopes of getting the reward that might be offered for it. Held, that these facts did not show such a taking as was necessary to constitute larceny. *Regina* v. *Gardner*, p. 243.

An interesting question arose in *Regina* v. *Burgess*, p. 258. The 11th, 12th, 13th, and 14th sections of the statute 24 & 25 Vict. c. 100, relate to attempts to commit murder by different specified methods; and the 15th section enacts that "Whosoever shall by any means other than those specified in the preceding sections, attempt to commit murder, shall be guilty of felony, &c." The question was, whether an attempt to commit suicide is an attempt to commit murder within the statute, or, in other words, whether the common law misdemeanor of attempting to commit suicide is merged in any of the felonies created by that act. And it was decided that it was not. POLLOCK C. B.: "If it were, it would follow that any one attempting to commit sucide by wounding himself must be indicted for the offence of wounding with intent to commit murder, which until very recently was punishable with death. There is a vast difference between inflicting a wound on

another and inflicting a wound on one's self with that intent."

STAR CHAMBER CASES. SHOWING WHAT CASES PROPERLY BELONG TO THE COGNIZANCE OF THAT COURT. Collected for the most part out of Mr. Crompton, his Book, Entitled, The Jurisdiction of Divers Courts. London: Printed by J. O. for John Grove, and are to be sold at his shop in Chancery Lane, over against the Sub Pœna Office. 1641. Small 4to. pp. 55.

This is a treatise upon the jurisdiction of the Court of Star Chamber, rather than a "book of Reports." It commences with a "Preamble explaining the causes properly belonging to the cognizance of the Star Chamber, viz.: Unlawful Assemblies, Routs, Riots, Forgeries, Perjuries, Cozoanages, Libelling, and other like misdemeanors not especially provided for by the Statutes." Perjury, more quaintly than accurately, is thus defined: "Perjury is a lie confirmed by oath." Cozenage embraced a large class of offences. "Cozenage is an offence, whereby any thing is done guilfully in or out of contracts, which cannot be termed by any special name." And the punishment was as broad as, and in keeping with the definition. "The punishment of this is arbitrary, as in our Realm, so likewise by the Civil Law."

As this volume is scarce, we print a few cases in illustration of its contents. Their brevity is certainly commendable.

"Note that one G. writes his letter to a juror to appear between L. and C. D. and to do his conscience, and he was fined at twenty pounds here, because he had nothing to do in the matter, circa 27 Eliz. Here note that no man ought to meddle in any matter depending in suit where he hath nothing to do."

"One L. O. of Kent was punished in the court for falsely going about to prove one that was his cousin or brother, to be a traitor, and for this he was adjudged to ride about Westminster Hall with his face to the horse-tail, circa 27 Eliz. as I heard."

"Note that one S. of the County of Lancaster for falsely procuring one to be indicted for the death of another, was fined in this court to a great sum, circa 31 Eliz."

"A Knight of the County of Northumberland was fined in a great sum in the Star Chamber, because he permitted a seditious book called Martin Marprelate to be printed in his house, 32 Eliz."

"One writes to a justice of the peace to send him his warrant with a blank, to put in one he would attach upon a suspicion of felony, and so the justice did, and because he sent his warrant with a blank to put in the name of one he knew not, neither the matter, before the making of his warrant, he was fined in this court, circa 30 Eliz.; and it was one Sir J. R."

"A woman great with child, which was suspected of incontinency without cause, was commanded to be whipped in Bridewell, London, by the Masters there; and because she fell to travail before her time, &c. they were for this fined in this court at a great sum. And by order of the court it was awarded that they should pay a certain sum to the said woman, about the 31 of Eliz. See the proceedings there concerning this matter the year aforesaid, set down more at large."

"A justice of the peace was put out of commission by order of this court, for because he refused to take the peace of one who came to him, and offered him surety for the peace, because the justice which did award the warrant was not his friend, for which reason he refused to go before him to be bound to the peace."

"In the case of Draiton Basset in Staffordshire, circa 22 Eliz. some justices which dwelt near unto the place where the riot was, were called into this

court by process, and fined, and it was upon the statute of 17 R. 2. cap. 8, which is, that the sheriff, and others the King's officers, shall apprehend rioters, which assemble themselves together in outrageous manner. And note, that this riot there was notorious, for there was a great number that were assembled in the manor house of Draiton Basset, and held it forcibly."

"If a man take upon him to maintain, and yet do not maintain in deed, he is punishable. Lib. Ass. 30. Dyer, 95. A man took money to give a verdict, although he gave no verdict yet notwithstanding he shall be fined. Dyer, 95. Fitzh. Nat. Br. 171. 21 H. 6. 2."

BACON'S ESSAYS AND COLOURS OF GOOD AND EVIL. With Notes and Glossarial Index. By W. ALDIS WRIGHT, M. A. Trinity College, Cambridge. Macmillan and Co. Cambridge and London. 1862. 18mo. pp. 464.

A copy of Lord Bacon's Essays, published in 1798, which is in the British Museum, is placed above all price, because it is one of five or six copies printed on large paper in folio. We apprehend that the present elegant edition would satisfy the taste of the most fastidious purchaser of books, if he were not a confirmed bibliomaniac. The Essays are a reprint of the third and last author's edition, which was published in small 4to in 1625, the year before Bacon's death. The Colours of Good and Evil are reprinted from the edition of 1597.

ENCYCLOPÆDIA OF ANTIQUITIES, AND ELEMENTS OF ARCHÆOLOGY, CLASSICAL AND MEDIÆVAL. By the Rev. THOMAS DUDLEY FOSBROKE. A New Edition, with Improvements. Two volumes. London: M. A. Nattali. 1843. Royal 8vo. pp. 1093.

"A vast store of real intelligence," says Lowndes. "A work as original as important; elegantly written and full of interesting information, with which every person of liberal education ought to be acquainted," says the Literary Chronicle. And truer criticisms were never penned. The research of the author was unlimited. And the result of that research is stated in a style unsurpassed for lucidity and elegance. The articles relating to the law are learned and attractive.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1863.	Returned by
Appleton, John C.	Marblehead,	February 13,	George F. Choate.
Blaze, William A.	Milton,	" 16,	George White.
Brainard, Charles H.	Boston,	" 7,	Isaac Ames.
Chamberlain, Henry M.	Cambridge,	" 27,	William A. Richardson.
Chambers, Aaron	Andover,	" 10,	George F. Choate.
Currier, Lewis	Boston,	" 16,	Isaac Ames.
Gile, Simon W.	Boston,	" 17,	Isaac Ames.
Greene, Nathaniel G.	Boston,	" 4,	Isaac Ames.
Hansen, Charles	Boston,	" 11,	Isaac Ames.
Howard, Ebenezer S.	South Danvers,	" 23,	George F. Choate.
Johnson, David B.	Southampton,	" 17,	Samuel F. Lyman.
Noyes, Lorenzo D.	Abington,	" 9,	William H. Wood.
Packard, Sihon (?)	North Bridgewater,	" 20,	William H. Wood.
Thwing, Melville C.	Marlboro',	" 4,	William A. Richardson.
Vickery, William J.	Cambridge,	" 21,	William A. Richardson.
Walsh, Peter	Marlboro',	" 14,	William A. Richardson.
Wiggin, Albert J.	Charlestown,	" 5,	William A. Richardson.
Willard, Charles H.	Marlboro',	" 7,	William A. Richardson.
Young, Francis	Lynn,	" 4,	George F. Choate.